(1)

No. 96-1370-CFX
Status: GRANTED

Title: Fidelity Financial Services, Inc., Petitioner
v.
Richard V. Fink, Trustee

Docketed:
February 27, 1997

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Gaughan,Michael P.

Counsel for respondent: Fink,Richard V.

NOTE: See mail label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Feb 25 1997	G	Petition for writ of certiorari filed. (Response due March 29, 1997)
2	Mar 29 1997		Brief of respondent Richard Fink in opposition filed.
3	Apr 9 1997		DISTRIBUTED. April 23, 1997 (Page 2)
5	May 5 1997		REDISTRIBUTED. May 8, 1997 (Page 25)
6	May 12 1997		Petition GRANTED. SET FOR ARGUMENT November 3, 1997. **********
7	Jun 26 1997		Brief amici curiae of American Automobile Manufacturers Association, et al. filed.
8	Jun 26 1997		Joint appendix filed.
9	Jun 26 1997		Brief of petitioner Fidelity Financial Services, Inc. filed.
10	Jul 28 1997		Brief of respondent Richard Fink filed.
11	Sep 16 1997		CIRCULATED.
12	Sep 23 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
13	Sep 25 1997		Record filed.
		*	Original record proceedings United States District Court for the Western District of Missouri.
14	Nov 3 1997		ARGUED.

SUPREME COURT, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Fidelity Financial Services acquisition of a purchase money security interest in the debtor's automobile constituted a preferential transfer which the bankruptcy trustee could avoid pursuant to 11 U.S.C. § 547.

LIST OF PARTIES

Denise Renee Beasley - Debtor

Richard V. Fink - Trustee in Bankruptcy

Fidelity Financial Services, Inc. - Creditor

Fidelity Financial Services, Inc. is a wholly owned subsidiary of Bank of Boston Corporation.

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OPINION BELOW

In Re Beasley, Fink v. Fidelity Financial Services, Inc., 102 F.3d 334 (8th Cir. 1996).

STATEMENT OF JURISDICTION

This Petition for Certiorari is for the purpose of seeking review from the United States Court of Appeals for the Eighth Circuit decision in *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). The Court of Appeals entered its Order on November 27, 1996. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a Writ of Certiorari the Eighth Circuit decision referenced above.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 547:

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.]

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS 101 et seq.]

(c) The trustee may not avoid under this section a transfer —

* * *

(3) that creates a security interest in property acquired by the debtor —

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

*** * ***

(e) (1) For the purposes of this section —

*** * ***

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) for the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transfer and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Mo. Rev. Stat. 301.600

* * *

2. A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application

for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

STATEMENT OF THE CASE

A. Nature of the Case

This is a bankruptcy proceeding in which Fidelity Financial Services, Inc., ("hereinafter Fidelity") is attempting to enforce its rights as a secured creditor of the debtor, Denise Renee Beasley. The Trustee in Bankruptcy, Richard Fink, sought to avoid Fidelity's security interest as a preferential transfer under 11 U.S.C. § 547. The Bankruptcy Court, District Court and Eighth Circuit have all ruled in the Trustee's favor.

B. Course of Proceedings

The debtor filed a petition under Chapter 7 of the Bankruptcy Code on November 18, 1994. United States Bankruptcy Court, Western District of Missouri: Case No. 94-43096-13. The debtor converted the proceedings to a case under Chapter 13 of the Bankruptcy Code on February 21, 1995. On May 8, 1995, the Trustee filed a complaint to set aside Fidelity's lien on an automobile owned by the debtor as a preferential transfer. The Honorable Frank W. Koger, Chief Bankruptcy Judge, United States District Court for the Western District of Missouri, sustained the Trustee's position and judgment was entered July 25, 1995 and amended on August 28, 1995. Fidelity

filed its Notice of Appeal with the District Court on July 24, 1995, and filed an Amended Notice of Appeal with the District Court on July 25, 1995. The District Court had jurisdiction to hear Fidelity's appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The appeal was from an Order entered in a "core" proceeding referred to the bankruptcy judge under 28 U.S.C. § 157(b)(2) and was made to the district judge in the judicial district in which the bankruptcy judge serves. For these reasons, the appeal was properly before the District Court.

On appeal to the District Court, Honorable Ortrie D. Smith, Judge, United States District Court, Western District of Missouri, Western Division, affirmed the Bankruptcy Court. United States District Court, Western District of Missouri: Case No. 95-0797-CV-W-3. Final judgment was entered in the District Court on February 9, 1996. Fidelity filed its Notice of Appeal to the Eighth Circuit Court of Appeals on February 9, 1996. The appeal to the Eighth Circuit was from a final judgment entered under 28 U.S.C. § 158(a). Accordingly, the Eighth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(d).

On November 27, 1996, the Eighth Circuit issued its opinion affirming the Bankruptcy Court and the District Court.

C. Statement of Relevant Facts

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #lZDLT20A4R5133799, by Denise R. Beasley ("Beasley"), Debtor. At that time, Beasley executed and delivered a Note and Security Agreement to Fidelity. (Appendix G, pp. 41a-45a).

2. August 17, 1994 was the 229th day of 1994. (Appendix G, pp. 41a-45a).

3. On or about September 7, 1994 (21 days later), Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. (Appendix G, pp. 41a-45a).

4. The "blue slip" (which is the secured party's copy of the Application for Title) was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994. (Appendix G, pp. 41a-45a).

5. At Fidelity's request, Susan M. Venturella, Senior Counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994 (26 days after creation of the debt and security interest). (Appendix G, pp. 41a-45a).

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee. (Appendix G, pp. 41a-45a).

7. November 18, 1994 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity. (Appendix G, pp. 41a-45a).

8. Fidelity is not an insider pursuant to 11 U.S.C. § 547. (Appendix G, pp. 41a-45a).

9. Fidelity filed a claim on December 16, 1994 in the amount of $14,670.15 but did not place a value on the security. (Appendix G, pp. 41a-45a).

10. The parties agree that the value of the vehicle is $14,000.00. (Appendix G, pp. 41a-45a).

11. The vehicle is fully insured and Fidelity Financial is listed as the loss payee. (Appendix G, pp. 41a-45a).

12. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that § 301.600 R.S. Mo. provides that a lien is perfected:

> *. . . by the delivery to the Director of Revenue [of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is* ***perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 cars thereafter, otherwise as of the time of the delivery*** *. . .* [*Emphasis added*].

(Appendix G, pp. 41a-45a).

13. The Trustee also demanded the debtor surrender the vehicle or pay the estate $2,500 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the Trustee his fees, estimated at $500, over three months. (Appendix G, pp. 41a-45a).

14. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. § 1305(a)(4). (Appendix G, pp. 41a-45a).

15. On March 30, 1995, Fidelity filed its Objection to Confirmation under § 1325(a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim. (Appendix G, pp. 41a-45a).

16. Also on March 30, 1995, the debtor announced at her § 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that should would either pay Fidelity or the unsecured creditors the value of the vehicle. (Appendix G, pp. 41a-45a).

17. Since the avoidance of the lien would benefit the estate the Trustee agreed to let counsel represent him in the effort to determine whether Fidelity had obtained a preference. (Appendix G, pp. 41a-45a).

18. On or about May 8, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after the Debtor received possession of the security, that the lien is therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant. (Appendix G, pp. 41a-45a).

19. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(F) over which the Court has jurisdiction of the subject matter. (Appendix G, pp. 41a-45a).

20. On appeal, the District Court affirmed the Bankruptcy Court's decision.

21. On appeal to the Eighth Circuit, the Court of Appeals affirmed the District Court. United States Court of Appeals for the Eighth Circuit, Case No. 96-1430.

REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE:

A. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THE TENTH AND ELEVENTH CIRCUITS;

B. THE ISSUE PRESENTED FOR REVIEW IS PURELY A LEGAL ISSUE OF STATUTORY INTERPRETATION ON STIPULATED FACTS;

C. THE ISSUE PRESENTED IS OF SIGNIFICANT IMPORTANCE TO CONSUMERS WHO PURCHASE AUTOMOBILES AND INSTITUTIONS WHICH FINANCE SUCH CONSUMER TRANSACTIONS; AND

D. A UNIFORM INTERPRETATION OF 11 U.S.C. § 547 WITH REGARD TO A BANKRUPTCY TRUSTEE'S POWER TO AVOID PREFERENTIAL TRANSFERS WOULD AID IN THE ORDERLY ADMINISTRATION OF BANKRUPTCY PROCEEDINGS IN OUR BANKRUPTCY COURTS.

Fidelity financed the debtor's purchase of an automobile on August 17, 1994. At that time, debtor executed a promissory note and security agreement in favor of Fidelity. Fidelity mailed the documents to perfect its lien to the Missouri Department of

Revenue on September 7, 1994, or 21 days after the security interest was granted. The Department of Revenue received those documents 26 days after the date the debtor signed the note and security agreement and delivered same to Fidelity. Because the last steps necessary to perfect Fidelity's lien in the debtor's property were taken within 90 days of the date debtor filed her petition in bankruptcy, the Trustee sought to avoid the security interest as a preferential transfer pursuant to 11 U.S.C. § 547(b).

Fidelity contends its security interest in the debtor's automobile comes within one of the statutory exceptions to the trustee's power to avoid preferential transfers. 11 U.S.C. § 547(c)(3) provides that the Trustee may not avoid a transfer that creates a purchase of money security interest in property acquired by the debtor if the security interest is perfected on or before 20 days after the debtor receives possession of the property. The Eighth Circuit ruled that Fidelity could not avail itself of this exception to the Trustee's avoidance power because Fidelity did not take the last steps necessary to perfect its security interest in the debtor's property within 20 days after the date debtor took possession of the automobile.

Fidelity asserts that in reaching the conclusion that it did not perfect its security interest within the 20 day time period set forth in 11 U.S.C. § 547(c)(3)(B), the Eighth Circuit did not properly consider 11 U.S.C. § 547(e)(1)(B) which provides "for the purposes of this section . . . the transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of a transferee." In this case, Fidelity was perfected on April 17, 1994, the date of transfer, due to its compliance with Mo. Rev. Stat. § 301.600.2 which provides in relevant part:

> *A lien on encumbrance on a motor vehicle or trailer is perfected by the delivery to the*

> *director of revenue of the existing certificate of ownership, if any, and application for a certificate of ownership containing the name and address of a lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within 30 days thereafter, otherwise as the time of delivery.*

Due to Fidelity's compliance with Mo. Rev. Stat. § 361.600.2, no creditor on a simple contract could acquire a judicial lien superior to Fidelity's after August 17, 1994.

Two Circuit Courts of Appeals have addressed this precise issue and have concluded that security interests in vehicles properly perfected under state vehicle perfection statutes are not subject to attack as preferential transfers even if the physical act of perfection occurs beyond the grace period set forth in § 547(c)(3)(B), since the security interest is deemed perfected under state law the moment that the security interest is created. In *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), *cert. denied*, *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991), Alfred D. Busenlehner and Faye Elaine Busenlehner (the Busenlehners), Debtors, purchased a car and entered into an Installment Sales Contract and Security Agreement on March 31, 1988 which was subsequently assigned to GMAC. On April 13, 1988, the Georgia Department of Motor Vehicles received a "MY-1 Title Application", thereby perfecting GMAC's security interest under Georgia law (which provides that a security interest in a motor vehicle is perfected as of the time of its creation if the title application is delivered to the Department of Motor Vehicles within 20 days). The Debtors filed a Petition under Chapter 7 of

the Bankruptcy Code on April 26, 1988 and the Chapter 7 Trustee then brought an adversary action against GMAC to set aside GMAC's lien as a preferential transfer (because perfection was not accomplished within 10 days as required by § 547(c)(3). GMAC argued that the security interest was not avoidable because § 547(e)(1)(B) permits the use of State relation-back statutes. Hence, the physical act of perfection did not need to occur within the 10 days grace period so long as, under State law, the security interest was deemed perfected within that period.

The Bankruptcy Court sustained the Trustee's Motion for Summary Judgment, and the District Court reversed. On appeal, the Eleventh Circuit affirmed the District Court, stating:

> *§ 547(c)(3) prevents Trustees from avoiding enabling loans that meet certain conditions. In the case at hand, the only dispute is whether the secured loan complied with the requirement that the loan be "perfected on or before 10 days after the debtor received possession" of the property. 11 U.S.C.A. § 547(c)(3)(B). The Trustee argues that the security interest was perfected on the 13th day following the signing of the security agreement. **GMAC argues that under § 547(c) the physical act of perfecting a lien does not need to occur within the 10 day period as long as, under State law, the security interest is deemed perfected within that period.** [Emphasis added].*
>
> *The issue that confronts us in this case is the meaning of § 547(c)(3)(B)'s phrase "perfected on or before 10 days". The Code*

defines the phrase in § 547(e)(1)(B). § 547(e) governs the timing, for preference purposes, when a transfer is made and when a transfer is perfected. This case presents this panel with a dispute over the latter event. § 547(e)(1)(B) states: "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

Thus, in order to determine when perfection occurs under § 547, it is necessary to ascertain when the perfected security interest can beat a judicial lien in a priority battle. As this court held in a related context, "this determination must be made by reference to State law" . . . [citation omitted]

Therefore we must turn to Georgia State law to determine when the perfected security interest can beat a judicial lien in a priority battle . . . Georgia law states that a security interest in a motor vehicle is perfected as of the date of its creation if the delivery [to the Department of Motor Vehicles of the proper documental is completed within 20 days . . . In the case at hand, the correct documents were delivered to the Commissioner within the statutory 20 days. Under State law, the security interest was deemed to have been perfected the moment that the security interest was created . . .

Because the Bankruptcy Code adopts state law under § 547(e)(1)(B), the date of

perfection for preference actions in this case is the date of the initial enabling loan. Therefore GMAC perfected the enabling loan within the necessary 10 day period.

This conclusion is supported by the policies underlying preference law. The goal of the drafters of this provision of the 1978 Bankruptcy Reform Act was to bring preference law "more into conformity with commercial practices and the Uniform Commercial law" [citation omitted]

Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow State Commercial Law their secured loans will be protected in Bankruptcy.

By limiting the effect of State relation-back statutes in Bankruptcy, legitimate commercial practices are penalized. To hold for the Trustee in this case may be beneficial in that it creates a larger estate to pay administrative expenses and unsecured claims . . . The creditor, moreover, lent the money in the expectation that the creditor's compliance with State law was stufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by fling for Bankruptcy and avoiding this otherwise acceptable security interest.

In *In re Hesser*, 984 F.2d 345 (10th Cir. 1993), James and Doris Hesser (the Hessers), Debtors, purchased and took possession of a 1990 Toyota on April 16, 1990. The Hessers executed a Retail Installment Sales Contract and Security Agreement which was subsequently assigned to General Motors Acceptance Corporation (GMAC). On the date of purchase, the seller executed and delivered a "Lien Entry Form" to the motor license agent (Oklahoma law provides that perfection of a security interest in a vehicle relates back to the date of purchase if a lien entry form is presented to the Oklahoma Tax Commission or its agent within 15 days of purchase). The lien entry form was actually received by the Oklahoma Tax Commission on May 1, 1990 (the 15th day after purchase). On May 18, 1990, the Hessers filed a Petition under Chapter 7 of the Bankruptcy Code. The Chapter 7 Trustee then filed an action to set aside GMAC's security interest as a preference pursuant to 11 U.S.C. § 547(b) (because the transfer was allegedly "for or on account of an antecedent debt owed by the debtor before such transfer was made since same was perfected more than 10 days after the execution of the security agreement and the creation of the debt occurred prior to, and not contemporaneously with the transfer of the security interest). GMAC countered that the transfer was contemporaneous with the creation of the debt because, under Oklahoma State law, perfection automatically related back to the date of purchase. Further, said transfer was a contemporaneous exchange for new value. The Trustee filed a Motion for Summary Judgment which was granted by the Bankruptcy Court and affirmed by the District Court. On appeal, the Eleventh Circuit reversed and stated:

> *The sole issue in dispute is the appropriate timing and method of the perfection of a security interest provided for in § 547 of the Bankruptcy Code. We agree with the 11th Circuit that the Bankruptcy Code adopts*

> *State law to determine the date of perfection under § 547(e)(1)(B) . . . [citation omitted]*
>
> *§ 547(e)(1)(B) applies to the perfection of a transfer of a fixture or property other than real property and provides "for purposes of this § a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee . . ."*
>
> ***Thus, in order to determine the date of perfection, it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle . . . This determination is made by reference to state law . . .***
>
> ***After the date of perfection is determined, the time of the transfer must be ascertained and must fit within the 10-day grace period provided in § 547(e)(2) . . . Thus, § 547(e) provides for a two step process: first, determine the date of perfection according to state law pursuant to § 547(e)(1)(A) or (B), and second, determine the time of transfer pursuant to § 547(e)(2).***
>
> *Because under Oklahoma law, GMAC's security interest was perfected on April 16, April 16 is also the date that GMAC s security interest was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract cannot acquire a judicial lien that is superior" to the secured*

creditor GMAC. Because the date of the perfection coincides with the date on which the security interest was granted, the transfer of the security interest was not "for or on account of an antecedent debt" 11 U.S.C § 547(b)(2), and also was "perfected on or before 10 cars after the debtor received possession of the property" 11 U.S.C. § 547(c)(3)(B). Therefore, because the Trustee cannot meet all of the elements necessary to avoid the transfer pursuant to § 547(b) and furthermore, GMAC can claim protection under § 547(c)(3). the transfer cannot be avoided be the Trustee. [*Emphasis added*].

The Court in *In re Power*, 133 B.R. 242 (Bkrtcy. N.D. Okla. 1991), addressed the same issue and reached the same result. On March 7, 1991, Judi E. Beaumont (Beaumont), Debtor, purchased and took possession of a 1989 GMC pickup truck, and executed a Retail Installment Contract and Security Agreement (which was assigned to GMAC). GMAC perfected its interest by filing a lien entry form with the Oklahoma Tax Commission on March 22, 1991 (15 days later). On April 10, 1991, Beaumont filed a Chapter 7 Petition. Thereafter, the Chapter 7 Trustee filed a complaint to avoid GMAC's lien as a preferential transfer because the act of perfection did not occur within the 10 day grace period prescribed by 11 U.S.C. § 547(e)(2). GMAC argued that its lien perfection on Day 15 related back to Day 1 under Oklahoma State law and the granting of the security interest was therefore legally contemporaneous with the creation of the debt. Hence, no transfer was made on account of an antecedent debt.

The court granted summary judgment in favor of GMAC citing *In Re Busenlehner*:

[2] The exact issue before this Court was before the 11th Circuit, in In re Busenlehner, 918 F.2d 928, 930 (11th Cir. 1990). In this case, the Trustee brought an adversary proceeding against GMAC to recover a preference GMAC had perfected its security interest in a motor vehicle thirteen days after the purchase and execution of the security agreement, but within the twenty-day grace period allowed by the state statute The state statute provided, as does the Oklahoma Statute, that if perfected within the allotted time, the lien relates back to the day of execution of the security agreement The Court held in favor of GMAC finding perfection related back to the date of the security agreement Therefore, perfection occurred within 10 days of the transfer of the security interest and GMAC's lien is excepted from avoidance under 11 USC 547(c)(3)(B) as not being on account of an antecedent debt The creation of the debt and the transfer of an interest of the debtor in property as collateral for that debt happened contemporaneously.

* * *

The Court points out that in the Hamilton case the applicable state statutes allowed a twenty-day grace period for perfection of the security interest but did not provide perfection to relate back to Day One, if the lien was perfected timely. In the Matter of Hamilton, 892 F.2d 1233, nn. 14-15.

This Court believes the Bankruptcy Code clearly states that the transfer occurs on Day One if the lien is perfected within ten days ***Under Oklahoma law, the lien of GMAC was deemed perfected on Day One even though the physical act of perfection occurred on Day 15. The Bankruptcy Code does not say the physical act of perfection has to occur within ten days; it just states that the lien must be perfected within ten days. Here, that requirement was met. No transfer of the Debtor's interest in property was made on account of an antecedent debt. Execution of the security interest, creation of the debt, and a transfer of Debtor's property happened at the same time and no avoidable preference occurred.***

This argument is buttressed by reference to Bankruptcy Code § 547(e)(1)(B) which states:

> *(B) a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.*

In the present case, this means that transfer was complete when a judgment creditor of the debtor could not obtain an interest superior to the interest of GMAC. Under Oklahoma law, GMAC's security interest in the truck was perfected on Day one and no

> *subsequent judgment creditor could obtain a superior interest in the truck.*

The case of *In re Burnett*, 14 B.R. 795 (Bkrtcy. E.D. Tenn. 1981) is also supportive. Raymond Burnett, Jr. (Burnett), Debtor, purchased and took possession of a truck on November 14, 1980. Burnett executed a Note and Security Agreement which was assigned to First Tennessee of Chattanooga (the Bank). On December 4, 1980, the Bank filed an Application for Title. On February 11, 1981, the Debtor filed a Petition under Chapter 7 of the Bankruptcy Code and the Trustee thereafter initiated an adversary action to set aside the Bank's security interest as preferential. The Bank argued that despite its failure to file the Application for Title within 10 days, its security interest was always perfected because it filed within the 20 day grace period allowed under Tennessee State law. The Bankruptcy Court (Ralph H. Kelley, Bankruptcy Judge), while acknowledging that Congress intended for 10 days to be a uniform grace period, held that Congress must have intended perfection under § 547(c)(3) to include perfection as a matter of law by virtue of state relation-back statutes:

> *It may be easiest to compare interpretations. The one that agrees with Congress's intent depends primarily on the tense of the definition. A security interest "is perfected" when a creditor "cannot" acquire a superior judicial lien. This seems to require the court to look at the facts at any moment from that perspective. Suppose that a bank has a purchase money security interest that it has notified to perfect, but the twenty day grace period has not expired. During the grace period and before the bank files, a creditor can possibly acquire a superior judicial lien.*

That depends on whether the bank actually does file within the grace period. If the bank does, then its security interest will have priority because its perfection will relate back to when the security interest attached, before the creditor acquired the judicial lien But from the creditor's perspective it could not know that was going to happen when it acquired its judicial lien.

This interpretation is consistent with Congressional intent. For Article 9 security interests, perfection would begin when the last step necessary for perfection occurred, but perfection would not relate back to an earlier step in the process of perfection.

The best way of looking at the bank's argument is to consider the definition as referring to a period of time. On that theory, the definition means a security interest is perfected during any period of time when a creditor cannot acquire a superior judicial lien. The period of time can begin before the last step necessary for perfection occurs.

The court believes this interpretation is the more reasonable of the two. Though both interpretations are consistent with the wording of the definition, this one is less troublesome than the interpretation that agrees with Congress's intent. That interpretation strains the wording of the definition to conclude that the court must consider the facts from an earlier

perspective, rather than as they turned out.

This interpretation is not objectionable on the basis of the floating lien cases. In those cases the courts held security interests perfected before they were perfected under the UCC. This preference statute was meant to overrule those cases But the problem in this case is not that the definition will allow perfection to occur before perfection under the UCC. Perfection during the grace period, even by relation back, is perfection under the UCC.

Thus, the court agrees with the bank's argument. Since it perfected during the grace period, its security interest was perfected from the time it attached, both under state law and under the definition of perfection in the preference statute. There was no transfer on account of an antecedent debt.

Virtually all states have statutes that require lien notation on a Certificate of Title in order to perfect an interest in motor vehicles. Likewise, § 9-301 of the Uniform Commercial Code (which has been adopted in some form or other by virtually all states) clearly states that the filing provisions of Article 9 do not apply to purchase money security interests in motor vehicles. Thus, it is arguable that Congress did not intend the 20 day relation-back period in § 547(c)(3) to apply to vehicles perfected under special State statutes exclusively governing perfection of interests in vehicles. Although the grace period in § 547(c)(3) for purchase money loans was changed from 10 days to 20 days in the 1994 amendments to the Bankruptcy Code because most

states have adopted 20 day grace periods under their particular version of § 9-301 of the Uniform Commercial Code, no reference was made to State statutes *specifically governing perfection of interests in motor vehicles*, which often include special relation-back periods exclusively for automobile financing.

The applicable vehicle perfection statute in Missouri is Mo. Rev. Stat. § 301.600.2 (1994). This statute has exclusively governed perfection of motor vehicles in Missouri since 1965. Thus, Missouri has a long-standing special statute governing perfection of interests in automobiles which specifically provides for a 30-day relation-back period. Fidelity provided financing and took steps to perfect its security interest in compliance with the aforementioned long-standing statute and in the expectation that the creditor's compliance with State law was sufficient to protect the loan *Busenlehner, supra.* Under Missouri law, Fidelity's lien was deemed perfected on August 17, 1994 even though the physical act of perfection occurred 21 days later, since "perfection during the grace period, even by relation-back, is perfection under the WCC." *Burnett, supra.* August 17, 1994 is also the date that Fidelity's lien was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract [could not] acquire a judicial lien" superior to Fidelity. Because the date of perfection coincides with the date of creation, the transfer of the security interest was not "for or on account of an antecedent debt" under § 547(b)(2) and was also perfected on or before 20 days after the Debtor received possession of the property under § 547(c)(3)(B). The Chapter 13 Trustee did not meet all of the elements necessary to avoid the transfer under § 547(b) and the transfer is not subject to avoidance. *Hesser, supra.*

Fidelity concedes that there is contrary authority. *See In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990); *In re Holder*, 892 F.2d

29 (4th Cir. 1989); *In the Matter of Tressler*, 771 F.2d 791 (3d Cir. 1983); *In re Loken*, 175 B.R. 56 (Bkrtcy. 9th Cir. 1994); *In re Holloway*, 132 B.R. 771 (Bkrtcy. N.D. Okla. 1991); *In re Scoviac*, 74 B.R 635 (Bkrtcy. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445 (Bkrtcy. N.D. Tenn. 1984); *In re Walker*, 77 F.3d 322 (9th Cir. 1996), February 26, 1996; *In re Walker*, 161 B.R 484 (Bkrtcy. D. Idaho 1993).

However, few of these cases appear to involve interpretation of a long-standing State statute *exclusively* governing perfection of security interests in *automobiles* and *specifically* including a relation-back period for perfection of vehicles. The State statutes at issue in *Hamilton, Loken, Murray, Scoviac, Tressler* and *Holder* apparently did not have a specific relation-back provision under a separate vehicle perfection statute and the lienholder was therefore forced to rely on the grace period provided in § 9-301 of that particular State's version of the *Uniform Commercial Code*. Missouri itself has a 20-day grace period for non-vehicle purchase money loans (Mo. Rev. Stat. § 400.9-301).

CONCLUSION

Fidelity's purchase money lien was properly perfected under the applicable Missouri motor-vehicle perfection statute, and is not subject to avoidance under § 547 of the Bankruptcy Code. The reasoning of the Tenth and Eleventh Circuits in *In re Hesser* and *In re Busenlehner,* should be adopted because they involve similar State statutes with specific relation-back periods for vehicles (separate and apart from the relation-back period provided for in § 9-301 of the Uniform Commercial Code). Moreover, lenders have been relying on the 30-day grace period provided for in perfecting interests in motor vehicles in Missouri since 1965, and Debtors "should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest."

The Eighth Circuit decision acknowledges that compliance with Mo. Rev. Stat. § 301.600.2 (1994) results in perfection as of the date of purchase and that Fidelity did, in fact, comply with the requirements of the Mo. Rev. Stat. § 301.600.2 (1994) such as to have its lien deemed perfected on the date of purchase. Again, the fact of the matter is that no creditor on a simple contract could acquire a judicial lien that was superior to Fidelity's interest after August 17, 1994, the date of the purchase. Nevertheless, the Eighth Circuit ruled that the state relation back statute should not apply when determining preferential transfers pursuant to 11 U.S.C. § 547. Fidelity contends the Eighth Circuit's holding in this regard is contrary to the plain language of 547(e)(1)(b) and moreover with the vast body of bankruptcy cases which have determined that state law governs with regard to matters of perfection of security interests.

Resolution of the issue presented will affect thousands of consumer transactions for the purchase of automobiles. The Eighth Circuit has acknowledged "Congress's desire to have a 'uniform rule throughout the county.' " A uniform interpretation of 11 U.S.C. § 547 will be consistent with this desire.

Wherefore, for the foregoing reasons, Fidelity respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED NOVEMBER 27, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1430

In re: Denise Renee Beasley,

Debtor,

Richard V. Fink, Trustee,

Appellee,

v.

Fidelity Financial Service, Inc.,

Appellant.

Appeal from the United States District Court for the Western District of Missouri.

[UNPUBLISHED]

Submitted: October 30, 1996

Filed: November 27, 1996

Before BEAM, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

Appendix A

PER CURIAM.

Fidelity Financial Services, Inc. ("Fidelity") appeals the district court's affirmance of the bankruptcy court's[1] order setting aside Fidelity's lien on the debtor's car as a voidable preference. The bankruptcy court's ruling depended on its conclusion that state relation-back statutes are inapplicable to preference-avoidance analysis under 11 U.S.C. § 547(c)(3)(B). This is an issue of first impression in this circuit. In agreement with the position of the Ninth Circuit, we now hold that state relation-back periods do not apply to section 547 analysis.

Section 547(b) of the Bankruptcy Code ("Code") allows a trustee in bankruptcy to avoid certain prepetition payments end transfers of a debtors property as "preferential transfers." Not all preferential transactions are voidable under section 547(b), however. As relevant here, section 547(c)(3)(A) provides an exception for interests securing new value. Section 547(c)(3)(B) allows a creditor a twenty-day grace period in which to perfect an interest securing new value and thereby protect the interest from the trustees preference-avoidance powers.

Under section 547(e)(1)(B), "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." Under Missouri law, if an interest in a vehicle is perfected within thirty days of the purchase, the perfection will be considered effective as of the date of purchase.

---

1. The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri, affirming the decision of the Honorable Frank W. Koger, Chief Judge, United States Bankruptcy Court for the Western District of Missouri.

Appendix A

Mo. Rev. Stat. § 301.600.2 (1994). According to the parties' stipulation, Fidelity fulfilled state requirements for perfecting its interest in the car twenty-one days after debtor purchased it. The issue in this case is whether Missourians thirty-day relation-back statute applies in determining whether Fidelity perfected its interest within the grace period provided by the Code.

The Ninth Circuit has concluded that state-law relation-back periods are inapplicable to preference-avoidance analysis. *In re Loken*, 175 B.R. 56, 61 (B.A.P. 9th Cir. 1994), *cited with approval in Fitzgerald v. First Sec. Bank of Idaho (In re Walker)*, 77 F.3d 322, 322 (9th Cir. 1996). The court reasoned that the Code's unambiguous definition of perfection required it to determine at what point a judicial lienholder is barred from obtaining rights superior to those of a transferee. 175 B.R. at 61-62. It held that such a bar arises "when the transferee takes the last step required by state law to perfect its security interest," and until then, "it is not possible to say that other creditors 'cannot' obtain superior rights." *Id.* at 62. The court concluded that determining perfection without reference to state grace periods is consistent with Congress's desire to have "a uniform rule throughout the country." *Id.* at 62-63.

We find this reasoning persuasive. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION FILED JANUARY 22, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 95-0797-CV-W-3

IN RE:

DENISE RENEE BEASLEY,

Debtor.

FIDELITY FINANCIAL SERVICES INC.

Appellant,

v.

RICHARD V. FINK, Trustee,

Appellee.

OPINION AFFIRMING BANKRUPTCY COURT'S RULING

Pending is an appeal of the Bankruptcy Court's decision setting aside Fidelity Financial Services' ("Fidelity's") lien in an automobile purchased by the Debtor. For the reasons set forth below, the Bankruptcy Court's decision is AFFIRMED.

Appendix B

I. BACKGROUND

The facts have been stipulated to by the parties. The Debtor purchased and obtained possession of a 1994 Ford Probe on August 17, 1994. At the same time, she delivered a promissory note to Fidelity in the amount of $14.090.80 with an interest rate of 20.85%. Debtor also entered into a security agreement with Fidelity. On September 7, 1994, or twenty-one days later Fidelity mailed an application for a Missouri Title to the Missouri Department of Revenue. The application was received by the Department of Revenue on September 12.

Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code on November 18, 1994. Following a series of events that are not relevant to this appeal, the case was converted to Chapter 13. The Trustee objected to Fidelity's assertion of a security interest in the automobile, and Fidelity appeals the Bankruptcy Court's decision sustaining that objection.

II. DISCUSSION

As the purported perfection of Fidelity's security interest occurred within ninety days prior to the filing of the petition, it must be set aside as a preference, *see* 11 U.S.C. § 547(b), unless the purchase money security exception contained in 11 U.S.C. § 547(c)(3) applies. This section provides that a transfer may not be avoided as a preference if the transfer creates a security interest in property "that is perfected on or before 20 days after the debtor receives possession of such property." *Id.* § 547(c)(3)(B).[1]

1. The other requirements for satisfying the purchase money security interest exception are not at issue on this case, and therefore will not be discussed.

Appendix B

At first glance, it appears clear that Fidelity's security interest was perfected beyond this grace period because the application was not mailed until twenty-one days after the Debtor obtained possession of the car. However, under Missouri law, a security interest in an automobile "is perfected as of the time of its creation if the delivery of the [application] to the director of revenue is completed within thirty days" after the security interest is created Mo. Rev. Stat. § 301.600.2. Fidelity contends that this statute, and not § 547(c)(3). governs, and it therefore entitled should be treated as a lien creditor.

The Bankruptcy Court's legal determinations are to be reviewed *de novo* Having conducted an independent review of the matter, I conclude the Bankruptcy Court should be affirmed. The Bankruptcy Code states that a lien is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." 11 U.S.C § 547(e)(1)(B). Obviously, state law will establish the acts necessary to actually perfect a lien. It is these acts that form the focus for an inquiry under the purchase money security interest exception; if the last act necessary to perfect a security interest is taken within twenty days of the filing of the case, the exception provided by § 547(c)(3) applies. If the last act is taken beyond the twenty day period (as was the case here), then the exception does not apply and the perfection of the lien is a preference. *See In re Hamilton,* 892 F.2d 1230,1233-34 (5th Cir. 1990); *In re Loken*, 175 B.R. 56, 61-63 (Bankr. 9th Cir. 1994). *In re Holloway,* 132 B.R. 771, 773-74 (Bankr. N.D. Okla. 1991); *In re Holder,* 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988).

The fact that Missouri law allows a longer period of time to perfect a lien on a motor vehicle is irrelevant to this inquiry. The provision allowing a lien perfected within thirty days of

Appendix B

transfer to be treated as "perfected on the day of its creation" defines the priority of a valid lien. However, this provision does not affect the relevant inquiry. Section 547(c)(3) applies if the security interest is actually perfected within twenty days, not if it is "deemed" perfected within twenty days.

Fidelity stresses the importance of honoring commercial expectations, which are based on compliance with state law. *E.g., In re Hesser,* 984 F.2d 345, 349 (10th Cir. 1993); *In re Busenlehner,* 918 F.2d 928, 931 (11th Cir.), *cert. denied,* 500 U.S. 949 (1991). Fidelity also stresses the historical state interest in special statutes governing security interests in motor vehicles. Of course, the very nature of bankruptcy upsets commercial expectations and commercial endeavors can be and often are guided by the Bankruptcy Code's provisions just as much as they are guided by relevant state law. Moreover, the concerns raised by Fidelity are policy considerations that are best addressed by Congress not the courts. Finally, despite Fidelity's suggestion, nothing in § 547(c)(3) suggests "that Congress did not intend the 20 day relation-back period . . . to apply to vehicles perfected under special State statutes governing perfection of interests in vehicles" *See Patterson v. Shumate,* 112 S. Ct. 2242, 2247 (1992) (clear language of Bankruptcy Code provision requires that it be enforced "according to its terms"). The Court is mindful of many instances in which Congress specifically directed that the Bankruptcy Code defer to or adopt provisions of state law. *E.g.,* 11 U.S.C. § 109(c)(2) (declaring when entities may be debtors under Chapter Nine of the Bankruptcy Code); *id.* § 522(b)(1) (permitting states to prohibit use of Bankruptcy Code's list of exemptions); *id.* § 522(f)(3) (referencing "State law that is applicable to the debtor" to limit avoidance of certain liens); *id.* § 547(c)(7) (declaring payments made under certain payments "made in

accordance with State or territorial law by a governmental unit" to not be preferences under certain circumstances), *id.* § 903 (preserving a State's power to control entities filing petition under Chapter Nine). In addition to these specific references to state law, the Bankruptcy Code is replete with references to "other applicable law," which serves to incorporate state law into those provisions. Thus, had Congress wanted to accord special status to state statutes governing security interests in motor vehicles, it knew how to accomplish this task. Congress' failure to so provide strongly suggests that the plain, straightforward interpretation of § 547(c)(3) adopted herein is proper. *See Loken*, 175 B.R. at 62-63.

III. CONCLUSION

For the reasons set forth above, the Bankruptcy Court's decision in this case is AFFIRMED.

IT IS SO ORDERED.

s/ Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: 1/22/96

APPENDIX C — AMENDED MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED AUGUST 28, 1995

IN THE UNITED STATES BANKRUPTCY
WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-2-13

Adv. No. 95-4081

IN RE:

DENISE R. BEASLEY,

Debtor.

RICHARD V. FINK, Chapter 13 Trustee,

Plaintiff

vs.

FIDELITY FINANCIAL SERVICES, INC.,

Defendant

AMENDED MEMORANDUM OPINION

Debtor filed for relief under 11 U.S.C. Chapter 7 on November 18, 1994. At the § 341 meeting and from documentation and claims filed, the Chapter 7 Trustee determined that there was a problem with the alleged secured position of Fidelity Financial Services. For that reason the

Trustee demanded that the debtor deliver possession of a 1994 Ford Probe which debtor had purchased and which debtor and Fidelity Financial Services thought was secured by a perfected lien in favor of said financial institution based on the monies advanced to debtor by said institution. Faced with the alternative of either turning the car over and letting the Trustee fight with Fidelity Financial Services or paying off the car in some fashion, debtor chose to convert to a Chapter 13. Debtor was then in effect a debtor in possession and the Chapter 13 Trustee engaged debtor's counsel to be his counsel to seek determination of the validity of Fidelity Financial's lien.

In this proceeding therefore, it would seem that debtor is basically somewhat of a stake holder and nothing more. If the Chapter 13 Trustee is successful and the lien is avoided, debtor by virtue of 11 U.S.C. §1325(a) (4) has to pay the value of the vehicle (less exemption) into the Chapter 13 plan for the unsecured creditors. If, on the other hand, the lien of Fidelity Financial is determined to be impregnable, debtor has to pay Fidelity Financial the balance due on the lien, at least to the value of the collateral.

With this background then, the Court will recite the facts which are basically stipulated to by the parties. Debtor purchased the 1994 Probe on August 17, 1994, and delivered at that time to Fidelity Financial Services, Inc. her promissory note for $14,909.80 with interest at the rate of 20.85%. Debtor also delivered to Fidelity Financial a security agreement which has been introduced into evidence.

On September 7, 1994, or 21 days later, Fidelity mailed an application for Missouri Title and License to the Missouri Department of Revenue together with the requisite fee for the

imposition of the lien on the face of the title. A copy of that application has also been submitted into evidence.

The so called "blue slip" which is secured party's copy of the application was processed by the Department of Revenue and returned to Fidelity with a file date of September 23, 1994. However, a search of the records determined, and the parties have agreed, that the Department of Revenue received Fidelity's application for title and imposition of lien on September 12, 1994. Putting all the dates together what is obvious already to informed readers is that Fidelity filed the necessary paper work and same was received by the Department of Revenue 26 days after the date debtor signed the note and security agreement and delivered same to Fidelity. The date of the filing of the petition was 93 days after August 17, 1994, and therefore outside the magic preference period because, of course, there is no claim that Fidelity is an insider. Nevertheless, the date that Fidelity mailed the application to the Department of Revenue that would procure for it a secured position, the date that same was received by the Department of Revenue, the date that the "blue slip" was returned to Fidelity, were all within the magic 90 days preference period. Informed readers will also note, of course, that as of October 22 or October 24, 1994, whichever date one prefers, Congress had decreed that 11 U.S.C. § 547(c)(3) would allow a snap back of 20 days from the date of purchase to the date of perfection under the so called purchase money security interest exception to preference law. The State of Missouri, on the other hand, allows a secured party 30 days to perfect a purchase money security interest and provides that if a secured party does transmit the title application and lien imposition paper work to the Department of Revenue within 30 days of the purchase, the lien is valid as a purchase money security interest against all parties obtaining any interest within the time period between purchase and receipt of application. *See* Mo. Rev. Stat. § 301.600.2 (1994), which provides in relevant part:

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> A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

Thus, we find the problem. Is it the bankruptcy law of 20 days that controls, or is it the state law of 30 days that controls?

There is a split in authority among the courts that have considered this exact issue. In *In re Hamilton*, 892 F.2d 1230, 1234-35 (5th Cir. 1990), and in *In re Loken*, 175 B.R. 56, 61 (Bankr. 9th Cir. 1994), the Fifth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel concluded that state law grace, or relationship-back, periods are inapplicable for purposes of determining whether a transfer is preferential under section 547. *See also In re Walker*, 161 B.R. 484, 501 (Bankr. D. Idaho 1993), *aff'd*, 178 B.R. 497 (D. Idaho 1994); *In re Holloway*, 132 B.R. 771, 773 (Bankr. N.D. Okla. 1991); *In re Holder*, 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988), *aff'd*, 94 B.R. 394 (M.D.N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989) (issue of applicability of state law relation-back period not appealed to the circuit court); *In re Scoviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 451 (Bankr. M.D. Tenn 1984).

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On the other hand, in *In re Hesser*, 984 F.2d 345, 348-49 (10th Cir. 1993), and in *In re Busenlehner*, 918 F.2d 928, 930-31 (11th Cir. 1990), *cert. denied, Moister v. General Motors Acceptance Corp.* 500 U.S. 949, 111 S.Ct. 2251, 114 L. Ed. 2d 492 (1991), the Tenth Circuit Court of Appeals and Eleventh Circuit Court of Appeals concluded that state law relation-back periods are applicable under a section 547 analysis. *See also In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981).

This Court is persuaded that the reasoning of the appellate courts in *Hamilton* and *Loken* and other courts which have determined that state law relation-back periods are inapplicable when deciding whether a preferential transfer has occurred is correct. The court in *Loken* discussed the split in authority and opined:

> Looking at the plain language of Section 547(e)(1), taken as a whole, we find that an ambiguity does not exist. The term "perfected" must be viewed in the context of the rest of the section and with regard for the usual usage of that term. Section 547(e)(1) states that a transfer is perfected when a creditor "cannot" acquire a superior interest. This Section directs courts to determine when a judicial lienholder is not able to obtain a position superior to that of the transferee in question. *See In re Lane*, 980 F.2d 601, 625 (9th Cir. 1992) (applying Section 547(e)(1)(A) — the definition of transfer is "ambiguous;" a transfer is perfected when a subsequent purchaser

cannot acquire a superior interest.) If a judicial lienholder could still obtain superior rights, then the transfer has not been perfected such that the lien holder "cannot" obtain superior rights. Essentially, under Section 547(e)(1), the court must determine the moment in time when a judicial lien creditor is barred from obtaining superior rights. This is a natural reading of the complete Code Section. The courts that have reached a different conclusion have taken the word "perfected" out of context of the remaining words of the statute. We hold that a creditor on a simple contract is barred from acquiring a judicial lien superior to the interest of the transferee when the transferee takes the last step required by state law to perfect its security interest. Until that last step is taken, other creditors could potentially obtain superior rights. Until this last step, it is not possible to say that other creditors "cannot" obtain superior rights.

This interpretation, that the term "perfected" refers to that single date, or moment in time, when the state perfection statute is satisfied, is also consistent with the general usage of the term. *See In re Holloway, supra,* 132 B.R. at 774 ("[I]n the real world perfection is actually accomplished on a particular date by doing a particular act."). A perfect example is the Oregon statute at issue here. The Oregon statute requires that

an application for notation of the interest on the certificate of title be sent to the DMV. The application must be accompanied by certain documentation. The application is marked when it is received by the DMV. The final act required by the Oregon statute is the submission of a completed application and supporting documentation. If everything is in order, "the security interest is *perfected* as of the date marked by the [DMV] on the application." O.R.S. § 803.097(3) (emphasis added). The last act required by Oregon law is the submission of a completed application and supporting documentation to the DMV. Once it is confirmed that this has been done properly, Oregon treats this last required act as the moment the security interest is perfected. This is simply how the term perfected is used in common usage.

Since this issue has produced such divergent views we also will look at the history of this Code section and the legislative intent behind it. The first thing we note is that Congress intended to harmonize the preference statute with the Uniform Commercial Code.

> [T]he adoption of the Uniform Commercial Code radically altered the terminology of secured transactions, and the courts have applied the new terminology to the

> preference sections, which uses certain of the same words as the uniform Commercial Code but in different senses and with different meanings. It is time to bring the two statutes into harmony, and H.R. 8200 does that by adopting the more modern terminology of the Uniform Commercial Code, and providing for specific treatment of transfers by the Code.

H. Rep. No. 595, 95th Cong., 1st Sess. 179 (footnotes deleted). This statement is consistent with our holding that section 547(e)(1) must be read in accordance with general commercial usage.

The Bankruptcy Act ("Act") set a twenty-one day time limit for perfection of transfers. Under Section 60(a)(7) of the Act, the time period would be shorter is state law provided for less time to perfect. However, while state law might provide for less time, Section 60(a)(7) clearly prohibited the use of a state statute to expand the twenty-one days maximum time limit. Congress's reason for changing the timing of Section 60(a)(7) to the ten day time period of Code Section 547(e)(2) is clear. Congress made the change to create a uniform rule throughout the country and it did not intend for state grace periods to be relevant under Section 547. *In*

re Burnette, supra, 14 B.R. at 801. Congress set the grace period at ten days to correspond with the grace period provided under the Uniform Commercial Code. *See In re Walker, supra,* 161 B.R. at 495 (quoting White and Summers, *Uniform Commercial Code* § 25-7, 447-48 (3d ed. 1988)). *See also Burnette, supra,* 14 B.R. at 800. Congress could have provided that each state's own version of Uniform Commercial Code Section 9-310(2) would be applicable. Then states, such as Oregon, could have adopted changes as they saw fit. However, Congress did not do this. Instead, it created one uniform grace period of ten days.

We also take note of Congress's enactment of the Bankruptcy Reform Act of 1994, which was signed into law on October 22, 1994. The Reform Act now allows a creditor twenty days to perfect its purchase money security interest while still qualifying for the enabling loan exception found in Section 547(c)(3). By this change, Congress acknowledged that states were enacting grace periods greater then ten days for such security interests. Congress could have deferred completely to the states by incorporating each state's own timing into the Code. Instead, it chose to continue having the Code itself dictate the applicable grace period. Furthermore, Congress did not amend Section 547(e)(1), which provides the definition for "perfection" as used in Section 547.

Even under the Reform Act then, if a creditor perfects its interest more than ten days after the transfer is effective between the parties, the transfer will be deemed made on the date of perfection, and a preference may therefore exist. If it is perfected within ten days, the transfer is deemed made as of the day it became effective between the parties. Under such circumstances, there will have been no transfer on account of an antecedent debt, and hence, no preference. The only difference under the new law is that lienholders asserting purchase money security interests, who perfect their interest within twenty days of the debtor taking possession of the property in question, may now be able to interpose Section 547(c)(3) as a defense to a preference action. For all purposes of Section 547 though, be it to determine if there was a transfer on account of an antecedent debt or if the enabling loan exception applies, perfection is still determined pursuant to Section 547(e), and is still determined without any reference to state grace periods.

The Panel now applies this law to the facts at hand. The parties agree that Romania's application for a notation of the security interest on the certificate of title was marked October 31, 1991. Clearly then, since there is no other mark on it, the application was received by the DMV on that date, it

contained all the required information and it was accompanied by all necessary documentation. The security interest was perfected on October 31,1991. *See* O.R.S. 803.097(3). On that date, Romania cut off any possibility that a judicial lien creditor could obtain superior rights in the collateral. The relation back effect of O.R.S. § 79.3010(2) is inapplicable.

. . . .

The plain language of section 547(e)(2) provides that a secured creditor will have a ten day grace period for perfecting its security interest. Pursuant to Section 547(e)(1), courts must look to state law to determine the moment in time in which the last step is taken to perfect a security interest. Varying grace periods provided for under state law are irrelevant. If the last necessary act was done within the ten day period of Section 547(e)(2)(A), the transfer will have been made when it became effective between the parties. If it is made after the ten day period, it will have been made when perfected under Section 547(e)(2)(B).

The security interest was effective between Loken and Romania on October 19, 1991. The DMV stamped Romania's application as received on October 31, 1991. The security interest was perfected on that date. This was

> beyond the ten day grace period allowed. Therefore, under 547(e)(2)(B), the transfer of the security interest is treated as made on October 31, 1991, and not October 19, 1991. Consequently, the transfer was made on account of an an antecedent debt under Section 547(b)(2) and the essential element of the preference claim was met.

Loken, 175 B.R. at 61-64.

The recent amendment to section 547(c)(3)(B), which extended the time period in which a lender may perfect its security interest from 10 to 20 days after the debtor receives possession of the property, is further support for the Court's conclusion that state law relation-back periods do not apply. As astutely noted by the bankruptcy court in *Walker*, 161 B.R. at 499, n.18:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code is currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, is is curious that some in Congress feel the need for an amendment to the Code. S. Rep. No. 103-168, 103d Cong. (1993).

See also H.R. Rep. 103-834, 103d Cong., 2d Sess. 20 (Oct. 4, 1994); 140 Cong. Rec. H10767 (Oct. 4, 1994) *reprinted in* Norton Bankruptcy Code Pamphlet p. 596 (1994-95 ed.) (The amendment to section 547(c)(3)(B) "conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.").[1]

Here, there is no dispute that Beasley received possession of the 1994 Ford Probe on August 17, 1994. Pursuant to Missouri law, the security interest was perfected at the earliest on September 7, 1994, or 21 days later, when Fidelity Financial mailed an application for Missouri Title and license noting the lien together with the requisite fee to the Missouri Department of revenue. *See In re Schalk*, 592 F.2d 993, 996-97 (8th Cir. 1979) (applying Missouri law) (The security interest is perfected at the earliest when the lender sends an application for a certificate of ownership noting the lien with the required fee to the Missouri Department of Revenue.); Mo. Rev. Stat. § 301.600.2 (1994). The 30-day relation-back period prescribed in Mo. Rev. Stat. § 301.600.2 is inapplicable. Fidelity Financial perfected its lien beyond the 20-day relation-back period provided in section 547(c)(3)(B). Fidelity Financial's security interest in the 1994 Ford Probe is deemed avoided pursuant to section 547(b). The Court will set aside Fidelity Financial's lien as a voidable preference.

---

1. The Court has read Judge Federman's well written opinion in *In re Chambers*, 125 B.R. 788 (Bankr. W.D. Mo. 1991). In that case, the lender never sent the application for Missouri title or the filing fee to the Missouri Department of Revenue. The lender was never shown as a lienholder on the title of the vehicle. When acknowledging that the lien was not perfected, Judge Federman noted that the lender failed to perfect the lien in accordance with the 30-day period prescribed in Mo. Rev. Stat. § 301.600, however, Judge Federman was not required to and did not address the issue presently before this Court.

Appendix C

CONCLUSION

Based on the above discussion, the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial services's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

So ORDERED this 28 day of August, 1995.

s/ Frank W. Koger
CHIEF BANKRUPTCY JUDGE

Copy of the above mailed to:

Maureen Scully, Esq.
UAW Legal Services
One Victory Dr., Suite 201
Liberty, MO 64068
ATTORNEY FOR DEBTOR(S)

Michael P. Gaughan, Esq.
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4420 Madison Avenue
Kansas City, MO 64111
ATTORNEY FOR FIDELITY FINANCIAL SERVICES, INC.

Richard Fink, Trustee
818 Grand, Suite 700
Kansas City, MO 64106-1910

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JULY 14, 1995

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-2-13

Adv. No. 95-4081

IN RE:

DENISE R. BEASLEY,

Debtor.

RICHARD V. FINK, Chapter 13 Trustee,

Plaintiff,

vs.

FIDELITY FINANCIAL SERVICES, INC.,

Defendant

MEMORANDUM OPINION

Debtor filed for relief under 11 U.S.C. Chapter 7 on November 18, 1994. At the § 341 meeting and from documentation and claims filed, the Chapter 7 Trustee determined that there was a problem with the alleged secured position of Fidelity Financial Services. For that reason the Trustee demanded that the debtor deliver possession of a 1994

Ford Probe which debtor had purchased and which debtor and Fidelity Financial Services thought was secured by a perfected lien in favor of said financial institution based on the monies advanced to debtor by said institution. Faced with the alternative of either turning the car over and letting the Trustee fight with Fidelity Financial Services or paying off the car in some fashion, debtor chose to convert to a Chapter 13. Debtor was then in effect a debtor in possession and the Chapter 13 Trustee engaged debtor's counsel to be his counsel to seek determination of the validity of Fidelity Financial's lien.

In this proceeding therefore, it would seem that debtor is basically somewhat of a stake holder and nothing more. If the Chapter 13 Trustee is successful and the lien is avoided, debtor by virtue of 11 U.S.C. §1325(b)(4) has to pay the value of the vehicle (less exemption) into the Chapter 13 plan for the unsecured creditors. If, on the other hand, the lien of Fidelity Financial is determined to be impregable, debtor has to pay Fidelity Financial the balance due on the lien, at least to the value of the collateral.

With this background then, the Court will recite the facts which are basically stipulated to by the parties, Debtor purchased the 1994 Probe on August 17, 1994, and delivered at that time to Fidelity Financial Services, Inc. her promissory note for $14,090.80 with interest at the rate of 20.85%. Debtor also delivered to Fidelity Financial a security agreement which has been introduced into evidence.

On September 7, 1994, or 21 days later, Fidelity mailed an application for Missouri Title and License to the Missouri Department of Revenue together with the requisite fee for the imposition of the lien on the face of the title. A copy of that application has also been submitted into evidence.

The so called "blue slip" which is the secured party's copy of the application was processed by the Department of Revenue and returned to Fidelity with a file date of September 23, 1994. However, a search of the records determined, and the parties have agreed, that the Department of Revenue received Fidelity's application for title and imposition of lien on September 12, 1994. Putting all the dates together what in obvious already to informed readers is that Fidelity filed the necessary paper work and same was received by the Department of Revenue 26 days after the date debtor signed the note and security agreement and delivered same to Fidelity. The date of the filing of the petition was 93 days after August 17, 1994, and therefore outside the magic preference period because, of course, there is no claim that Fidelity is an insider. Nevertheless, the date that Fidelity mailed the application to the Department of Revenue that would procure for it a secured position, the date that same was received by the Department of Revenue, the date that the "blue slip" was returned to Fidelity, were all within the magic 90 day preference period. Informed readers will also note, of course, that as of October 22 or October 24, 1994, whichever date one prefers, Congress had decreed that 11 U.S.C. § 547(c)(3) would allow a snap back of 20 days from the date of purchase to the date of perfection under the so called purchase money security interest exception to preference law. The State of Missouri, on the other hand, allows a secured party 30 days to perfect a purchase money security interest and provides that if a secured party does transmit the title application and lien imposition paper work to the Department of Revenue within 30 days of the purchase, the lien is valid as a purchase money security interest against all parties obtaining any interest within the time period between purchase and receipt of application. *See* Mo. Rev. Stat. § 301.600.2 (1994), which provides in relevant part:

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> A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

Thus, we find the problem. Is it the bankruptcy law of 20 days that controls, or is it the state law of 30 days that controls?

There is a split in authority among the courts that have considered this exact issue. In *In re Hamilton*, 892 F.2d 1230, 1234-35 (5th Cir. 1990), and in *In re Loken*, 175 B.R. 56, 61 (Bankr. 9th Cir. 1994), the Fifth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel concluded that state law grace, or relation-back, periods are inapplicable for purposes of determining whether a transfer is preferential under section 547. *See also In re Walker*, 161 B.R. 484, 501 (Bankr. D. Idaho 1993), *aff'd*, 178 B.R. 497 (D. Idaho 1994); *In re Holloway*, 132 B.R. 771, 773 (Bankr. N.D. Okla. 1991); *In re Holder*, 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988), *aff'd*, 94 B.R. 394 (M.D.N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989) (issue of applicability of state law relation-back period not appealed to the circuit court); *In re Soviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 451 (Bankr. M.D. Tenn. 1984).

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On the other hand, in *In re Hesser*, 984 F.2d 345, 348-49 (10th Cir. 1993), and in *In re Busenlehner*, 918 F.2d 928, 930-31 11th Cir. 1990), *cert. denied, Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L.Ed.2d 492 (1991), the Tenth Circuit Court of Appeals and Eleventh Circuit Court of Appeals concluded that state law relation-back periods are applicable under section 547 analysis. *See also In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981).

This Court is persuaded that the reasoning of the appellate courts in *Hamilton* and *Loken* and other courts which have determined that state law relation-back periods are inapplicable when deciding whether a preferential transfer has occurred is correct. The court in *Loken* discussed the split in authority and opined:

> Looking at the plain language of Section 547(e)(1), taken as a whole, we find that an ambiguity does not exist. The term "perfected" must be viewed in the context of the rest of the section and with regard for the usual usage of that term. Section 547(e)(1) states that a transfer is perfected when a creditor "cannot" acquire a superior interest. This Section directs courts to determine when a judicial lienholder is not able to obtain a position superior to that of the transferee in question. *See In re Lane*, 980 F.2d 601, 625 (9th Cir. 1992) (applying Section 547(e)(1)(A) — the definition of transfer is "unambiguous;" a transfer is perfected when subsequent purchaser cannot acquire superior

interest.) If a judicial lienholder could still obtain superior rights, then the transfer has not been perfected such that the lien holder "cannot" obtain superior rights. Essentially, under Section 547(e)(1), the court must determine the moment in time when a judicial lien creditor is barred from obtaining superior rights. This is a natural reading of the complete Code Section. The courts that have reached a different conclusion have taken the word "perfected" out of the context of the remaining words of the statute. We hold that a creditor on a simple contract is barred from acquiring a judicial lien superior to the interest of the transferee when the transferee takes the last step required by state law to perfect its security interest. Until that last step is taken, other creditors could potentially obtain superior rights. Until this last step, it is not possible to say that other creditors "cannot" obtain superior rights.

This interpretation, that the term "perfected" refers to that single date, or moment in time, when the state perfection statute is satisfied, is also consistent with the general usage of the term. *See In re Holloway, supra,* 132 B.R. at 774 ("[I]n the real world perfection is actually accomplished on a particular date by doing a particular act."). A perfect example in the Oregon statute at issue here. The Oregon statute requires that an application for notation of the interest on the

certificate of title be sent to the DMV. The application must be accompanied by certain documentation. The application is marked when it is received by the DMV. The final act required by the Oregon statute is the submission of a completed application and supporting documentation. If everything is in order, "the security interest is *perfected* as of the date marked by the [DMV] on the application." O.R.S. § 803.097(3) (emphasis added). The last act required by Oregon law is the submission of a completed application and supporting documentation to the DMV. Once it is confirmed that this has been done properly, Oregon treats this last required act as the moment the security interest is perfected. This is simply how the term perfected is used in common usage.

Since this issue has produced such divergent views we also will look at the history of this Code section and the legislative intent behind it. The first thing we note is that Congress intended to harmonize the preference statute with the Uniform Commercial Code.

> [T]he adoption of the Uniform Commercial Code radically altered the terminology of secured transactions, and the courts have applied the new terminology to the preference sections, which uses certain of the

> same words as the Uniform Commercial Code but in different senses and with different meanings. It is time to bring the two statutes into harmony, and H.R. 8200 does that by adopting the more modern terminology of the Uniform Commercial Code, and providing for specific treatment of transfers by the Code.

H. Rep. No. 595, 95th Cong., 1st Sess. 179 (footnotes deleted). This statement is consistent with our holding that Section 547(e)(1) must be read in accordance with general commercial usage.

The Bankruptcy Act ("Act") set a twenty-one day time limit for perfection of transfers. Under Section 60(a)(7) of the Act, the time period would be shorter if state law provided for less time to perfect. However, while state law might provide for less time, Section 60(a)(7) clearly prohibited the use of a state statute to expand the twenty-one days maximum time limit. Congress's reason for changing the timing of Section 60(a)(7) to the ten day time period of Code Section 547(e)(2) is clear. Congress made the change to create a uniform rule throughout the country and it did not intend for state grace periods to be relevant under section 547. *In re Burnette, supra*, 14 B.R. at 801. Congress

set the grace period at ten days to correspond with the grace period provided under the Uniform Commercial Code. *See In re Walker, supra*, 161 B.R. at 495 (quoting White and Summers, *Uniform Commercial Code* § 25-7, 447-48 (3d ed. 1988). *See also Burnette, supra*, 14 B.R. at 800. Congress could have provided that each state's own version of Uniform Commercial Code Section 9-310(2) would be applicable. Then states, such as Oregon, could have adopted changes as they saw fit. However, Congress did not do this. Instead, it created one uniform grace period of ten days.

We also take note of Congress's enactment of the Bankruptcy Reform Act of 1994, which was signed into law on October 22, 1994. The Reform Act now allows a creditor twenty days to perfect its purchase money security interest while still qualifying for the enabling loan exception found in Section 547(c)(3). By this change, Congress acknowledged that states were enacting grace periods greater than ten days for such security interests. Congress could have deferred completely to the states by incorporating each state's own timing into the Code. Instead, it chose to continue having the Code itself dictate the applicable grace period. Furthermore, Congress did not amend Section 547(e)(1), which provides the definition for "perfection" as used in Section 547.

Even under the Reform Act then, if a creditor perfects its interest more then ten days after the transfer is effective between the parties, the transfer will be deemed made on the date of perfection, and a preference may therefore exist. If it is perfected within ten days, the transfer is deemed made as of the day it became effective between the parties. Under such circumstances, there will have been no transfer on account of an antecedent debt, and hence, no preference. The only difference under the new law is that lienholders asserting purchase money security interests, who perfect their interest within twenty days of the debtor taking possession of the property in question, may now be able to interpose Section 547(c)(3) as a defense to preference action. For all purposes of Section 547 though, be it to determine if there was a transfer on account of an antecedent debt or if the enabling loan exception applies, perfection is still determined pursuant to Section 547(e), and is still determined without any reference to state grace periods.

The Panel now applies this law to the facts at hand. The parties agree that Romania's application for a notation of the security interest on the certificate of title was marked October 31, 1991. Clearly then, since there is no other mark on it, the application was received by the DMV on that date, it

contained all the required information and it was accompained by all necessary documentations. The security interest was perfected on October 31, 1991. *See* O.R.S. 803.097(3). On that date, Romania cut off any possibility that a judicial lien creditor could obtain superior rights in the collateral. The relation back affect of C.R.S. § 79.3010(2) is inapplicable.

. . . .

The plain language of Section 547(e)(2) provides that a secured creditor will have a ten day grace period for perfecting its security interest. Pursuant to Section 547(e)(1), courts must look to state law to determine the moment in time in which the last step is taken to perfect a security interest. Varying grace periods provided for under state law are irrelevant. If the last necessary act was done within the ten day period of Section 547(e)(2)(A), the transfer will have been made when it became effective between the parties. If it is made after the ten day period, it will have been made when perfected under Section 547(e)(2)(B).

The security interest was effective between Loken and Romania on October 19, 1991. The DMV stamped Romenia's application as received on October 31, 1991. The security interest was perfected on that date. This was

> beyond the ten day grace period allowed. Therefore, under Section 547(e)(2)(B), the transfer of the security interest is treated as made on October 31, 1991, and not October 19, 1991. Consequently, the transfer was made on account of an antecedent debt under Section 547(b)(2) and that essential element of the preference claim was met.

Loken, 175 B.R. at 61-64.

The recent amendment to section 547(c)(3)(B), which extended the time period in which a lender may perfect its security interest from 10 to 20 days after the debtor receives possession of the property, is further support for the Court's conclusion that state law relation-back periods do not apply. As astutely noted by the bankruptcy court in *Walker*, 161 B.R. at 499, n.18:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, it is curious that some in Congress feel the need for an amendment to the Code. S. Rep. No. 103-168, 103d Cong. (1993).

See also H.R. Rep. 103-834, 103d Cong., 2d Sess. 20 (Oct. 4, 1994); 140 Cong. Rec. H10767 (Oct. 4, 1994) *reprinted in* Norton Bankruptcy Code Pamphlet p. 596 (1994-95 ed.) (The amendment to section 547(c)(3)(B) conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.").[1]

Here, there is no dispute that Beasley received possession of the 1994 Ford Probe on August 17, 1994. Pursuant to Missouri law, the security interest was perfected on September 7, 1994, or 21 days later, when Fidelity Financial mailed an application for Missouri Title and License noting the lien together with the requisite fee to the Missouri Department of Revenue. *See In re Schalk*, 592 F.2d 993, 996-97 (8th Cir. 1979) (applying Missouri law) (The security interest is perfected when the lender sends an application for a certificate of ownership noting the lien with the required fee to the Missouri Department of Revenue.); Mo. Rev. Stat § 301.600.2 (1994). The 30-day relation-back period prescribed in Mo. Rev. Stat. § 301.600.2 is inapplicable. Fidelity Financial perfected its lien beyond the 20-day relation-back period provided in section 547(c)(3)(B). Fidelity Financial's security interest in the 1994 Ford Probe is deemed avoided

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1. The Court has read Judge Federman's well written opinion in *In re Chambers*, 125 B.R. 788 (Bankr. W.D. Mo. 1991). In that case, the lender never sent the application for Missouri Title or the filing fee to the Missouri Department of Revenue. The lender was never shown as a lienholder on the title of the vehicle. When acknowledging that the lien was not perfected, Judge Federman noted that the lender failed to perfect the lien in accordance with the 30-day period prescribed in Mo. Rev. Stat. § 301.600, however, Judge Federman was not required to and did not address the issue presently before this Court.

Appendix D

pursuant to section 547(b). The Court will set aside Fidelity Financial's lien as a voidable preference.

CONCLUSION

Based on the above discussion, the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial Services's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

So ORDERED this 14 day of July, 1995.

s/ Frank W. Koger
CHIEF BANKRUPTCY JUDGE

APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED AUGUST 28, 1995

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri

Case No. 94-43096-13

Adv. No. 95-4081-13

Richard Fink

Plaintiff(s)

v.

Fidelity Financial Services

Defendant(s)

AMENDED JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable Frank W. Koger, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

* * *

IT IS ORDERED AND ADJUDGED: the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial Services' lien is set aside as a voidable preference.

Appendix E

The foregoing Memorandum Opinion constitutes Findings of Facts and Conclusions of Law as required by Rule 7052, Rules of Bankruptcy.

ROBERT F. CONNOR
Clerk of Bankruptcy Court

[Seal of the U. S. Bankruptcy Court]

By: Michele Blodig
Deputy Clerk

Date of issuance: 8/28/95

Maureen Scully
Michael Gaughan
Richard Fink

APPENDIX F — JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JULY 25, 1995

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri

Case No. 94-43096-13

Adv. No. 95-4081-13

RICHARD FINK

Plaintiff(s)

v.

FIDELITY FINANCIAL SERVICES

Defendant(s)

AMENDED JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable Frank W. Koger, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

* * *

IT IS ORDERED AND ADJUDGED: Fidelity Financial Service's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Rule 7052, Rules of Bankruptcy.

Appendix F

ROBERT F. CONNOR
Clerk of Bankruptcy Court

[Seal of the U. S. Bankruptcy Court]

By: Michele Blodig
Deputy Clerk

Date of issuance: 7/25/95

Maureen Scully
Michael Gaughan
Richard Fink

APPENDIX G — STIPULATION OF FACTS OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JUNE 9, 1995

THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-1

Adversary Proceeding
No. 95 4081

In RE: Denise R. Beasley

Debtor

RICHARD V. FINK
CHAPTER 13 TRUSTEE

Plaintiff,

vs.

FIDELITY FINANCIAL SERVICES, INC.

Defendant.

STIPULATION OF FACTS

COME NOW Fidelity Financial Services, Inc. and Richard V. Fink, by and through their attorneys of record, and stipulate to the following:

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #1ZDLT20A4R5133799, by Denise R. Beasley ("Beasley").

Appendix G

At that time, Beasley had possession of the vehicle and executed and delivered a Note in the amount of $14,090.80 at 20.85% and Security Agreement to Fidelity, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A."

2. August 17 was the 229th day of 1994.

3. On or about September 7, 1994, 21 days later, Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. A copy of said Application is attached hereto and incorporated herein by reference as Exhibit "B."

4. The "blue slip" was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994, 37 days after August 17. A copy of said filed Application is attached hereto and incorporated herein by reference as Exhibit "C."

5. At Fidelity's request, Susan M. Venturella, Senior counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994, 26 days after August 17. A copy of Susan Venturella's February 10, 1995 letter and the Department of Revenue's copy of the Application for Title, showing a "Received" date of September 12, 1994, is attached hereto and incorporated herein by reference as Exhibit "D."

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee.

Appendix G

7. November 18 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity.

8. Fidelity is not an insider pursuant to 11 U.S.C. Section 547.

9. Fidelity filed a claim on December 16, 1994 in the amount of $14,670.15 but did not place a value on the security.

10. The parties agree that the value of the vehicle is $14,000.00.

11. The vehicle is fully insured and Fidelity Financial is listed as the loss payee.

12. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that Section 301.600 R.S.Mo. provides that a lien is perfected.

> ". . . by the delivery to the Director of Revenue [of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is *perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 days thereafter, otherwise as of the time of delivery* . . ." (Emphasis added.)

13. The Trustee also demanded the debtor surrender the vehicle or pay the estate $2,500.00 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the trustee his fees, estimated at $500.00, over three months.

14. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. Section 1305 (a)(4).

15. On March 30, 1995, Fidelity filed its Objection to Confirmation under 1325 (a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim.

16. Also on March 30, the debtor announced at her Section 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that she would either pay Fidelity or the unsecured creditors the value of the vehicle.

17. Since the avoidance of the lien would benefit the estate the Trustee agreed to let counsel represent him in the effort to determine whether Fidelity had obtained a preference.

18. On or about June 7, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after

the Debtor received possession of the security, that the lien is therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant.

19. This is a "core proceeding" within the meaning of 28 U.S.C. Section 157(b)(2)(f) over which the Court has jurisdiction of the subject matter.

20. Venue is properly laid in this Court pursuant to 28 U.S.C. Section 1409.

21. Defendant Fidelity's attorney has entered his appearance and accepts service on behalf of the defendant.

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Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1370

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether when the parties are before the Bankruptcy Court, the Bankruptcy Code's definition of when a transfer is perfected should prevail over the state law's definition?

2. Whether concerns which gave rise to the earlier disparate Circuit opinions favoring state law have since been addressed by Congress and are not "important matters" compelling review by this Court?

3. Since the 1994 amendment to 11 U.S.C. § 547, Circuit opinions have uniformly agreed on the interpretation that Bankruptcy law trumps state law, so this issue is not an important question of federal law which has not been, but should be, settled by this Court.

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RELEVANT STATUTES INVOLVED

11 U.S.C. § 547 (1994) provides, in pertinent part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —
>
> **Prerequisites for lien avoidance**
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made —
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if —
>
> (A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer —

Contemporaneous Exchange Exception

(1) to the extent that such transfer was —

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

. . . [or]

(3) that creates a security interest in property acquired by the debtor —

Purchase Money Security Interest or Enabling Loan Exception

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

. . .

(e)(1) For the purposes of this section —

. . .

Perfected Defined

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

When Transfer Made

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after,

such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Burdens of Proof

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the

nonavoidability of a transfer under subsection (c) of this section.

REASONS FOR DENYING THE WRIT

I.

WHETHER WHEN THE PARTIES ARE BEFORE THE BANKRUPTCY COURT, THE BANKRUPTCY CODE'S DEFINITION OF WHEN A TRANSFER IS PERFECTED SHOULD PREVAIL OVER THE STATE LAW'S DEFINITION?

The Trustee argues Ms. Beasley's grant to Fidelity of a security interest within ninety days of filing her bankruptcy is avoidable; and, pursuant to 11 U.S.C. § 547(g), he has met his burden of proving the avoidability of this transfer. First, Ms. Beasley gave a security interest in her 1994 Ford Probe to Fidelity for a debt she owed as of August 17, 1994, satisfying the creditor benefit element of 11 U.S.C. § 547(b)(1). Second, Fidelity did not perfect its lien within the ten-day grace period. Thus the transfer was made when perfected, twenty-one days later. Consequently, the debt was antecedent to the transfer. 11 U.S.C. § 547(b)(2). Third, Debtor's insolvency was not in dispute. 11 U.S.C. § 547(b)(3). Fourth, as Fidelity was not an insider, the 90-day deadline of 11 U.S.C. § 547(b)(4) applied and was met. Finally, the preference enabled Fidelity to receive more than it would have if the transfer had not been made. 11 U.S.C. § 547 (b)(5).

The burden shifts to Fidelity to prove the transfer comes within one of the exceptions to the avoiding power. 11 U.S.C. § 547(g). Did it satisfy the requirements of the purchase money security interest exception of 11 U.S.C. § 547(c)(3)? The Trustee acknowledges the creditor's success under § 547(c)(3)(A). It

was an enabling loan. But Fidelity stumbled at § 547(c)(3)(B)'s twenty-day requirement. It did not perfect the security interest on or before twenty days after Ms. Beasley received her vehicle.

Fidelity relies upon the thirty-day relation back provisions of Mo. Rev. Stat. § 301.600.2 (1994) to escape the consequences of the plain meaning of the Bankruptcy Code. Its reliance is misplaced.

Returning to 11 U.S.C. § 547(e)(1)(B), a transfer is perfected "when a creditor on a simple contract **cannot** acquire an interest that is superior to the interest of the transferee." The Supreme Court views the plain language of the Bankruptcy Code as determinant in its interpretation of statutory provisions. *Patterson v. Shumate,* 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992). If a judgment creditor had executed on Ms. Beasley's vehicle within thirty days of the granting of the security interest, could Fidelity hope to triumph if the title documents were mailed after the thirtieth day? Definitely not. The only chance Fidelity would have of winning the hypothetical state court priority battle would be to prove the requisite documents were mailed within the state law's thirty-day relation back period. But even so, the judicial lien creditor would have a better interest than Fidelity's, however fleeting, until that superior interest was dethroned by the artificial relation back provision of Missouri law. So, a creditor on a simple contract could have acquired an interest superior to the interest of the transferee, Fidelity. 11 U.S.C. § 547(e)(1)(B).

Fidelity perfected its lien within the thirty days the Missouri statute allows for the perfection of the lien to relate back to its creation. But, Fidelity took twenty-one days to mail the appropriate documents and fee to the Missouri Department of Revenue; and guided by the twenty days allowed in § 547 of the Bankruptcy Code, Bankruptcy Judge Koger avoided Fidelity's

lien as a preference on the grounds it was one day late. The District Court affirmed as did the Eighth Circuit.

At first blush, the result may seem unfair. Scholars weighing in on this issue, however, posit that clear and generous preference legislation becomes murky in its application because it transgresses the common sense of market norms and because courts cannot find "subversive collusion between debtor and favored creditor." Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference,* 39 Stan. L. Rev. 3, 11 (1986). Accord, White and Summers, *Uniform Commercial Code* § 25-7, pages 447-48 (3d ed. 1988). Both cited *In Re: Walker,* 161 B.R. 484 (Bkrtcy. D. Idaho 1993).

In summary, the issue is not really between the debtor and the creditors; but, it is one of creating a level playing field for all of the unsecured creditors. After all one purpose of the Bankruptcy Code is to stop the "race to the courthouse."

II.

WHETHER CONCERNS WHICH GAVE RISE TO THE EARLIER DISPARATE CIRCUIT OPINIONS FAVORING STATE LAW HAVE SINCE BEEN ADDRESSED BY CONGRESS AND ARE NOT "IMPORTANT MATTERS" COMPELLING REVIEW BY THIS COURT?

Bear in mind the fluid nature of 11 U.S.C. § 547(c)(3)(B). Before 1986, it read "that is perfected before 10 days after such security interest attaches." Thereafter, Congress changed it to "that is perfected on or before 10 days after the debtor receives possession of the property." Since October, 1994, the statute provides "on or before 20 days after the debtor receives possession of the property." Judge Koger in the underlying

Beasley opinion astutely cited *In Re: Walker,* 161 B.R. 484 (Bkrtcy. D. Idaho 1993). In that case the parties stipulated that all the requirements of a preference were present except whether the transfer of the security interest in the vehicle was "for or on account of an antecedent debt." 11 U.S.C. § 547(b)(2). If the transfer was found to be for an antecedent debt, the lender sought the protection of the enabling loan exception to preference avoidance. The lender cited an Idaho statute drafted "*solely* as a means of defending its beneficiaries against avoidance of their security interest in federal bankruptcy proceedings" (emphasis in the original) *Id.* at 499. In ruling against the lender the Court noted as an aside:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code is currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, it is curious that some in Congress feel the need for an amendment to the Code.

S. Rep. No. 103-168, 103d Cong. (1993). *Id.* at 499.

III.

SINCE THE 1994 AMENDMENT TO 11 U.S.C. § 547, CIRCUIT OPINIONS HAVE UNIFORMLY AGREED ON THE INTERPRETATION THAT BANKRUPTCY LAW TRUMPS STATE LAW, SO THIS ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A lender argued to the Fifth Circuit the applicability of the Texas Uniform Commercial Code twenty-day grace period instead of the 11 U.S.C. § 547(c)(3)(B) ten- now twenty-day period. This lien was perfected in thirteen days. *In Re: Hamilton,* 892 F.2d 1230 (5th Cir. 1990). The Fifth Circuit held that bankruptcy law prevailed and the lien was avoided.

By the end of 1990, the Eleventh Circuit rewarded a creditor's argument that state law grace periods can allow the perfection of a lien to relate back to its creation and therefore come within the ten- now twenty-days of 11 U.S.C. § 547(c)(3)(B). *In Re: Busenlehner,* 918 F.2d 928 (11th Cir. 1990), *cert. denied,* in *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991). Fidelity purports that a departure from the *Busenlehner* holding will result in commercial disaster. However, Fidelity is being overly dramatic.

Bankruptcy Judge Wilson took Fidelity's chamber of horrors argument, *vis-a-vis Busenlehner,* head on when he wrote in *In re: Holloway,* 132 B.R. 771 (Bkrtcy. N.D. Ok. 1991) at page 774:

> The [*Busenlehner*] court reached this result because "Debtors should not be given the ability to surprise and upset established

> commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest," and to prevent "legitimate commercial practices" from being "penalized," *id.* But "Debtors" were not trying to avoid the security interest on their own behalf; rather, the bankruptcy Trustee was trying to avoid it for the sake of other creditors as a group. Moreover, most transfers attached under Section 547 are "legitimate . . . established commercial practices;" it is preferential effect, not illegality or evil intent, which Section 547 aims to redress.

The Tenth was the last Circuit to have a say in the matter before District Judge Smith affirmed Judge Koger in the case at bar. *In Re: Hesser,* 984 F.2d 345 (10th Cir. 1993). The creditor took the tack that one of the five basic requirements of 547(b) had not been met, i.e., that the transfer of the security interest was not "for or on account of an antecedent debt," and the Tenth Circuit agreed. However, this opinion was rendered prior to the 1994 amendments changing the enabling loan grace period from ten to twenty days.

On February 26, 1996, the United States Court of Appeals for the Ninth Circuit weighed into the fray with *In Re: Walker,* 77 F.3d 322 (9th Cir. 1996). Siding with *Hamilton, supra,* the Ninth Circuit held the Bankruptcy Code's definition of when a transfer is perfected trumps the law of the state and the state's relation back provision cannot save it.

" 'What constitutes a transfer and when it is complete' is matter of federal law." *Barnhill v. Johnson,* 503 U.S. 393, 397, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39 (1992) (*quoting*

McKenzie v. Irving Trust Co., 323 U.S. 365, 369-70, 65 S. Ct. 405, 407-08, 89 L. Ed. 305 (1945)). *Id.* at 323.

Thereafter, the Eighth Circuit ruled in the case at bar agreeing with the Ninth Circuit. The Fifth Circuit reiterated its position on December 16, 1996, with *Matter of Locklin,* 101 F.3d 453 (5th Cir. 1996), squarely endorsing its earlier opinion in *Hamilton, supra,* noting:

> We also note that, in 1994, Congress amended Sec. 547(c)(3)(B) to provide a grace period of 20 days rather than 10 . . . . It is difficult to see why Congress would have passed this amendment if it did not believe that the federal grace period in Sec. 547(c)(3)(B) prevails over conflicting state-law grace periods.

Id. at 442.

CONCLUSION

Fidelity's assertion that the issue presented is of significant importance to consumers who purchase automobiles and institutions which finance such consumer transactions is incorrect.

A normal consumer has no clue about security interests and the perfection thereof. Moreover, the issue is not between the debtor and a creditor; but, it is creditor versus creditor and the maximization of the Bankruptcy estate for the benefit of all of the creditors.

Fidelity may prefer the Missouri statute and its thirty day grace period, but the Congress did not chose to defer to state

law, even though it had that option. District Judge Smith in the case at bar noted many instances in which Congress specifically directed that the Bankruptcy Code defer to or adopt provisions of state law. The Bankruptcy Code is the law of the land unless the Congress opts out and leaves it to local practice. The Constitution says we must have uniform Bankruptcy Laws. The Congress would not have repeatedly expanded the ambit of 11 U.S.C. § 547(c)(3)(B) if it meant state law to control.

Further, the Trustee suggests that Fidelity's insistence on charging Ms. Beasley 20.85 percent interest in August, 1994 undermines its protestations. First, the bankruptcy surprise seems to have been factored into its "established commercial practice" as a similar loan from a commercial bank to a "non-distressed" borrower would be at a substantially lower rate. Second, only a debtor with soiled credit history would acquiesce to such a rate, thereby sounding an alarm to the prudent creditor. Third, a creditor with the foresight to assess such a rate of interest stretches credulity asserting it was not forewarned to perfect within the Bankruptcy Code's twenty days.

Illustrative of this "heads I win, tails you lose" view is the creditor's position in *In Re: Smallwood*, 1997 WL 33023 (Bkrtcy. E.D. Ky.). Here the Trustee wanted the court to follow state law, and it was the lender who argued that the bankruptcy 20 days trumps Kentucky's 10 days. The court agreed with the creditor and did not avoid the lien.

The Trustee requests the Supreme Court of the United States deny Fidelity's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 96-1370

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 25, 1997
CERTIORARI GRANTED MAY 12, 1997

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11/18/94	First Meeting of Creditors Scheduled For 1:00 12/19/94 At Trustee's Office, Ste. 607 Last Day To Oppose Discharge: 2/17/95 (ys) [EOD 11/18/94]
11/22/94	Courts Certificate of Mailing Re: [0-0] First Meeting # of notices: 26. (ys) [EOD 11/22/94] [94-43096]
11/28/94	Notice of Appointment of Trustee, Bond Amt $7,300,000 Gary D Barnes (kf) [EOD 11/30/94] [94-43096]
12/16/94	Notice of Appearance And Request For Service Of Notice By Michael P. Gaughan for Creditor Fidelity Financial Services, Inc. (dh) [EOD 12/19/94] [94-43096]
12/19/94	First Meeting Held and Examination of Debtor. (br) [EOD 12/21/94]
2/16/95	Motion by Debtor Denise Renee' Beasley To Convert Case From Chapter 7 to Chapter 13 (5) (br) [EOD 02/16/95] [94-43096]
2/16/95	Chapter 13 Plan. (br) [EOD 02/21/95] [94-43096]

2/16/95	Amended Schedules E,J And Certificate of Service. (br) [EOD 02/21/95] [94-43096]
2/21/95	Order Granting [5-1] Motion To Convert Case From Chapter 7 to Chapter 13 by Denise Renee' Beasley Trustee Gary D. Barnes terminated. (br) [EOD 02/21/95] [94-43096]
2/22/95	Certificate Of Service By Maureen Scully for Debtor Denise Renee' Beasley Of [7-1] Chapter 13 Plan. (mr) [EOD 02/22/95] [94-43096]
2/23/95	First Meeting of Creditors Scheduled For 9:00 3/30/95 At Trustee's Office, Ste. 607; Last Day to File Proofs Of Claim: 6/28/95 (ys) [EOD 02/23/95]
2/23/95	Courts Certificate of Mailing Re: [0-0] First Meeting # of notices: 28. (ys) [EOD 02/23/95] [94-43096]
2/28/95	Order For Employer: Ford Motor Co. To Pay Trustee $77.00 weekly. (mb) [EOD 02/28/95] [94-43096]
3/8/95	Case Reassigned. Involvement of Judge Karen M. See Terminated. Judge Frank Koger in 94-43096 Assigned. (dh) [EOD 03/08/95] [94-43096]
3/30/95	Objection By Creditor Fidelity Financial Services, Inc. To Confirmation Of Plan. (mb) [EOD 03/30/95] [94-43096]

3/30/95	Hearing Re: [12-1] confirmation of plan Objection by Fidelity Financial Services, Inc. schd For 9:00 5/8/95 at Rm 927, Kansas City (mb) [EOD 03/30/95] [94-43096]
3/30/95	First Meeting Held and Examination of Debtor. (mb) [EOD 04/12/95]
4/3/95	Trustee's Report of No Distribution and Notice of Intent to Abandon By Trustee Gary D. Barnes. (mb) [EOD 04/04/95] [94-43096]
4/19/95	Motion By Creditor Housing and Urban Dev. For Relief From Stay regarding real property. RecNr: none (mb) [EOD 04/20/95] [94-43096]
4/20/95	Notice and Order Setting hearing on [14-1] Motion For Relief From Stay regarding real property by Housing and Urban Dev.; Objections due by 5/4/95; Hearing scheduled for 9:00 5/8/95 at Rm 927, Kansas City (mb) [EOD 04/20/95] [94-43096]
5/5/95	Order Granting [14-1] Motion For Relief From Stay regarding real property by Housing and Urban Dev. (mb) [EOD 05/05/95] [94-43096]
5/8/95	Hearing Held Re: [12-1] confirmation of plan Objection by Fidelity Financial Services, Inc. Consent order regarding stay. Special setting for objection to confirmation. Court to do notice. (td) [EOD 05/08/95] [94-43096]
5/8/95	Joint Stipulation and Order Granting [14-1] Motion For Relief From Stay regarding real property by Housing and Urban Dev. (td) [EOD 05/08/95] [94-43096]

5/8/95	Application By Trustee Richard Fink To Employ UAW Legal Services Plan as special counsel for Trustee. (td) [EOD 05/08/95] [94-43096]
5/8/95	Declaration by Maureen Scully in Support To [18-1] Application To Employ UAW Legal Services Plan as special counsel for Trustee by Richard. (td) [EOD 05/08/95] [94-43096]
5/8/95	Order Granting [18-1] Application To Employ UAW Legal Services Plan as special counsel for Trustee by Richard Fink (td) [EOD 05/08/95] [94-43096]
5/9/95	Hearing Re: [12-1] confirmation of plan Objection by Fidelity Financial Services, Inc. schd For 9:00 6/9/95 at Rm 927, Kansas City (mb) [EOD 05/09/95] [94-43096]
6/6/95	Complaint (95-4081) Denise R. Beasley vs. Fidelity Financial Services, Inc. NOS 454 Recover Money/Property Receipt # (dc) [EOD 06/06/95] [95-4081]
6/6/95	Trustee's Application to Defer Filing Fees and Order. (95-4081) (dc) [EOD 06/06/95] [95-4081]
6/9/95	Stipulation by and between Creditor Fidelity Financial Services, Inc., Debtor Denise Renee' Beasley For adequate protection payments and payment of sales tax preconfirmation settling [12-1] confirmation of plan Objection by Fidelity Financial Services, Inc. (mb) [EOD 06/09/95] [94-43096]

6/9/95	Order Granting [21-1] stipulation by Denise Renee' Beasley, Fidelity Financial Services, Inc. allowing debtor to pay 919.22 dollars for sales taxes Document [12-1] terminated. (mb) [EOD 06/09/95] [94-43096]
6/9/95	Hearing Held Re: [12-1] confirmation of plan Objection by Fidelity Financial Services, Inc. Stipulation filed, debtor to pay sales taxes and allow adequate protection. (mb) [EOD 06/09/95] [94-43096]
7/14/95	Disposition of Adversary (95-4081) Granting [1-1] Complaint NOS 454 Recover Money/ Property (sw) [EOD 07/14/95] [95-4081]
7/14/95	Adversary Case (95-4081) Closed. (sw) [EOD 07/14/95] [95-4081]
7/25/95	Clerk's Judgment For Plaintiff Richard V. Fink in 95-04081 Against Defendant Fidelity Financial Services, Inc. in 95-04081 (mb) [EOD 07/25/95] [94-43096 95-4081]
8/28/95	AMENDED Clerk's Judgment For Plaintiff Richard V. Fink in 95-04081 Against Defendant Fidelity Financial Services, Inc. in 95-04081. IT is ordered and adjudged the Chapter 13 Trustee's request for relief in is complaint is Granted. Fidelity Financial Services lien is set aside as a voidable preference. The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Rule 7052, Rules of Bankruptcy. (mb) [EOD 08/28/ 95] [94-43096 95-4081]

9/6/95	TRANSMITTAL of Record on Appeal BK No 94-43096-13 APP 95-4081-13 Bankruptcy Record on Appeal (rt)
9/6/95	NOTICE RE: BANKRUPTCY APPEAL; appellant's brief due 9/21/95 (rt)
9/8/95	Request By Trustee Richard Fink For Hearing Re: [7-1] Chapter 13 Plan. (mb) [EOD 09/08/95] [94-43096]
9/8/95	Hearing Re: [7-1] Chapter 13 Plan Confirmation Hearing scheduled 9:00 10/16/95 at Rm 927, Kansas City (mb) [EOD 09/08/95] [94-43096]
9/8/95	Courts Certificate of Mailing Re: [0-0] Hearing # of notices: 32. (mb) [EOD 09/08/95] [94-43096]
9/13/95	Motion By Creditor Fidelity Financial Services, Inc. To Stay [24-1] Judgment Order, [23-1] Judgment Order pending appeal, and for trustee to hold all plan payments until final order. (mb) [EOD 09/14/95] [94-43096]
9/15/95	ORDER: by Judge D. B. Bartlett: reassigning this case to Judge Ortrie D. Smith (cc: all counsel) (dh)
9/18/95	Hearing Re: [27-1] Motion To Stay [24-1] Judgment Order, [23-1] Judgment Order pending appeal, and for trustee to hold all plan payments until final order by Fidelity Financial Services, Inc. Scheduled For 9:00 10/16/95 at Rm 927, Kansas City (va) [EOD 09/18/95] [94-43096]

9/19/95	MOTION by defendant/appellant Fidelity Financial to extend time to file appeal w/sugg (gk) [Entry date 09/20/95]
9/26/95	ORDER by Judge Ortrie D. Smith granting motion to extend time to file appeal [4-1] to 10/11/95 (cc: all counsel) (gk) [Entry date 09/28/95]
10/11/95	BRIEF FILED by defendant/appellant Fidelity Financial (gk)
10/16/95	Hearing Held Re: [27-1] Motion To Stay [24-1] Judgment Order, [23-1] Judgment Order pending appeal, and for trustee to hold all plan payments until final order by Fidelity Financial Services, Inc [7-1] Chapter 13 Plan. P.O. Confirming R.F, trustee to hold money pending appeal, Order entered staying judgment; Objection to confirmation by Fidelity MOOT. (mb) [EOD 10/17/95] [94-43096]
10/16/95	Order Granting [27-1] Motion To Stay [24-1] Judgment Order, [23-1] Judgment Order pending appeal, and for trustee to hold all plan payments until final order by Fidelity Financial Services, Inc. (mb) [EOD 10/17/95] [94-43096]
10/17/95	Courts Certificate of Mailing Re: [28-1] Order # of notices: 32. (mb) [EOD 10/17/95] [94-43096]
10/24/95	MOTION by plaintiff/appellee Richard V Fink to extend time to file appellee's brief (dh) [Entry date 10/25/95]

10/26/95	Order Confirming Chapter 13 Plan as ORALLY amended 3/30/95. (mb) [EOD 10/26/95] [94-43096]
10/26/95	Courts Certificate of Mailing Re: [30-1] chapter 13 plan Order # of notices: 32. (mb) [EOD 10/26/95] [94-43096]
10/27/95	ORDER by Judge Ortrie D. Smith granting appelle Richard F. Fink motion to extend time to file appellee's brief [7-1] until 11/15/95 (cc: all counsel) (gk) [Entry date 10/30/95]
11/15/95	BRIEF FILED by interested party Richard V Fink (dh) [Entry date 11/16/95]
11/30/95	Order, and motion To Allow Claims as filed Objections due within 20 days. (mb) [EOD 11/30/95] [94-43096]
11/30/95	Courts Certificate of Mailing Re: [32-2] Order # of notices: 30. (mb) [EOD 11/30/95] [94-43096]
12/19/95	Objection By Debtor Denise Renee' Beasley To Claim of Jackson Co Water Dist #1 (ds) [EOD 12/20/95] [94-43096]
12/19/95	Objection By Debtor Denise Renee' Beasley To Claim of American Ntl Insurance (ds) [EOD 12/20/95] [94-43096]
12/19/95	Objection By Debtor Denise Renee' Beasley To Claim of JC Penney (ds) [EOD 12/20/95] [94-43096]

12/19/95	Objection By Debtor Denise Renee' Beasley To Claim of MO Guaranteed Student Loan (ds) [EOD 12/20/95] [94-43096]
12/19/95	Objection By Debtor Denise Renee' Beasley To Claim of World Financial Ntwk (ds) [EOD 12/20/95] [94-43096]
12/20/95	Hearing Re: [38-1] Claims Objection Claim of World Financial Ntwk by Denise Renee' Beasley schd For 9:00 1/22/96 at Rm 927, Kansas City, [37-1] Claims Objection Claim of MO Guaranteed Student Loan by Denise Renee' Beasley schd For 9:00 1/22/96 at Rm 927, Kansas City, [36-1] Claims Objection Claim of JC Penney by Denise Renee' Beasley schd For 9:00 1/22/96 at Rm 927, Kansas City, [35-1] Claims Objection Claim of American Ntl Insurance by Denise Renee' Beasley schd For 9:00 1/22/96 at Rm 927, Kansas City, [34-1] Claims Objection Claim of Jackson Co Water Dist #1 by Denise Renee' Beasley schd For 9:00 1/22/96 at Rm 927, Kansas City (ds) [EOD 12/20/95] [94-43096]
1/22/96	Hearing Held Re: [38-1] Claims Objection Claim of World Financial Ntwk by Denise Renee' Beasley, [37-1] Claims Objection Claim of MO Guaranteed Student Loan by Denise Renee' Beasley, [36-1] Claims Objection Claim of JC Penney by Denise Renee' Beasley, [35-1] Claims Objection Claim of American Ntl Insurance by Denise Renee' Beasley, [34-1] Claims Objection Claim of Jackson Co Water Dist #1 by Denise Renee' Beasley. Orders allowing objections. (sw) [EOD 01/22/96] [94-43096]

1/22/96	Order Granting [34-1] Claims Objection Claim of Jackson Co Water Dist #1 by Denise Renee' Beasley. Claim is disallowed. (sw) [EOD 01/22/96] [94-43096]
1/22/96	Order Granting [35-1] Claims Objection Claim of American Ntl Insurance by Denise Renee' Beasley. Claim is disallowed. (sw) [EOD 01/22/96] [94-43096]
1/22/96	Order Granting [36-1] Claims Objection Claim of JC Penney by Denise Renee' Beasley. Claim is disallowed. (sw) [EOD 01/22/96] [94-43096]
1/22/96	Order Granting [37-1] Claims Objection Claim of MO Guaranteed Student Loan by Denise Renee' Beasley. Claim is disallowed. (sw) [EOD 01/22/96] [94-43096]
1/22/96	Order Granting [38-1] Claims Objection Claim of World Financial Ntwk by Denise Renee' Beasley. Claim is disallowed. (sw) [EOD 01/22/96] [94-43096]
1/22/96	ORDER by Judge Ortrie D. Smith denying pla's appeal motion Bankruptcy Record on Appeal [1-1] the Bankruptcy Court's decision in this case is affirmed and terminating case (cc: all counsel) (kg)
2/5/96	CERTIFICATE by defendant/appellant Fidelity Financial of service of copy of ntc of appeal to US Ct of Appeals for the 8th Cir (jg2) [Entry date 02/07/96]

2/9/96	CLERK'S JUDGMENT that the Bankruptcy Court's decision is this case is Affirmed Entered on: 2/9/96 (cc:All Counsel) (dh)
2/9/96	NOTICE OF APPEAL by defendant/appellant Fidelity Financial from Dist. Court decision [12-1] Filed 2/9/96 Entered 2/9/96 Paid $ 105.00 Rct. # 106195 (kp) [Entry date 02/13/96]
2/14/96	Delivered to USCA 2 ctfd cpys of appeal ntc and dkt entries; 2 cpys of Ord fld: and Jgm fld: and NOA Supplement (cc: attys and Judge) (kp) [Entry date 02/21/96]
2/20/96	Bankruptcy Case Docketed Dist. Ct. Office: Kansas City (11b)
2/20/96	CERTIFIED copies notice of appeal, docket entries, [96-1430] and judgment of 1/22/96 from district court[675713] (11b)
2/20/96	BRIEFING SCHEDULE: [96-1430] Method of Apndx due on 3/1/96; DR aplnt due on 3/1/96; Aplee DR due on 3/11/96; Joint Apndx due on 4/1/96; Aplnt brief due on 4/1/96; Aplee brief due on 5/1/96 ; Reply brief due on 5/15/96; (lib)
2/26/96	Notification by Circuit Court of Appellate Docket Number 96-1430 (kp)
3/1/96	APPEARANCE for appellant, attorney Michael P. Gaughan [96-1430] [680480] (11b)
3/1/96	DESIGNATION of record received from Appellant Fidelity Financial. Type of appendix: joint [96-1430] (rla)

3/1/96	REMARKS: No transcripts necessary. [96-1430] (rla)
3/11/96	APPEARANCE for appellee, attorney Maureen A. Scully [96-1430] [684205] (11b)
4/1/96	BRIEF FILED – Brief of Appellant – Fidelity Financial 19 pgs w/addendum – 10 copies – w/ service 3/28/96 . Defects: summ. and req. of oral erg., summ. of erg., [96-1430] [692508] (rla)
4/1/96	RECORDS received: Joint Appendix, consisting of one Volume(s) 3 copies. [96-1430] (rla)
4/30/96	BRIEF FILED – Brief of Appellee – Richard V. Fink. 15 pgs w/addendum – 10 copies – w/service 4/29/96. [96-1430] [703542] (rla)
5/3/96	TO SCREENING - to dcm. [96-1430] [705555] (smg)
5/8/96	RETURNED from Screening – NO ARGUMENT. [96-1430] (smg)
5/10/96	No Arg letter sent to counsel. [96-1430] (smg)
10/7/96	SUBMITTED ON THE BRIEFS without oral argument to Judges C. A. Beam, David R. Hansen, Morris S. Arnold. [96-1430] (dmh)
11/2/96	Case Reassigned to Judge Arthur Federman in 94-43096 (bcap) [EOD 11/02/96] [94-43096]

11/27/96	THE COURT: C. A. Beam, David R. Hansen, Morris S. Arnold . PER CURIAM OPINION FILED: UNPUBLISHED [96-1430] [784830] (mjh)
11/27/96	JUDGMENT: C. A. Beam, David R. Hansen, Morris S. Arnold : The judgment of the lower court is AFFIRMED in accordance with the opinion. [96-1430] [784831] (mjh)
12/4/96	JUDGE ORDER: It is hereby ordered at the direction of the court that the unpublished per curiam opinion filed on November 27, 1996, be published. [787110] (mjh)
12/18/96	MANDATE ISSUED [96-1430] (mjh)
12/23/96	CERTIFIED copy of judgment and order from USCA ORDERED THAT affirming the decision of the District Court [13-1]; Mandate issued: 12/ 18/96; Appeal record due 1/22/97 (cc: all counsel) (mm) [Entry date 12/24/96]
12/26/96	RECEIPT for Mandate. [96-1430] [795439] (mjh)
3/3/97	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/25/97. Supreme Ct. Case No. 96-1370 [96-1430] [820253] (mjh)
5/15/97	Notification from Supreme Court dated 5/12/97 stating that they had entered an order granting Supreme Court notice for certiorari [820253-1] [96-1430] [853272] in Sup. Ct. No. 36-1370. [96-1430] (mjh)

5/19/97	WRIT of certiorari was filed in the U.S. Supreme Court and has been granted The Supreme Court No. is 96-1370 (kp)

5

No. 96-1370

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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35 pp

QUESTION PRESENTED FOR REVIEW

Whether the acquisition and perfection of a security interest in the debtor's automobile by Fidelity Financial Services, Inc. constituted a preferential transfer which the bankruptcy trustee could avoid pursuant to 11 U.S.C. § 547.

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Statutes Cited:

11 U.S.C. § 547	i, 1, 5, 7, 12, 26, 28
11 U.S.C. § 547(b)	10, 16, 26
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Other Authorities Cited:

Uniform Commercial Code § 9-301	23, 27, 28
140 Cong. Rec. S4536-37 (1994)	26

OPINIONS BELOW

The Eighth Circuit opinion is reported at *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). (Appendix to Petition, A.) The District Court's opinion is unreported but can be found in the appendix to Fidelity's Petition. (Appendix to Petition, B). The Bankruptcy Court's opinion is reported at *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 183 B.R. 857 (Bkrtcy. W.D. Mo. 1995). (Appendix to Petition, C, D.)

STATEMENT OF JURISDICTION

This proceeding is for the purpose of seeking review from the United States Court of Appeals for the Eighth Circuit decision in *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). The Court of Appeals entered its Order on November 27, 1996. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a Writ of Certiorari the Eighth Circuit decision referenced above.

STATUTORY PROVISIONS OF LAW

11 U.S.C. § 547

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.]

(B) the transfer had not been made; and

(C) such creditor receive payment of such debt to the extent provided by the provisions of this title [11 USCS 101 et seq.]

(c) The trustee may not avoid under this section a transfer —

* * *

(3) that creates a security interest in property acquired by the debtor —

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

* * *

(e) (1) For the purposes of this section —

* * *

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) for the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transfer and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Mo. Rev. Stat. 301.600.

* * *

2. A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement and the required

certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

STATEMENT OF THE CASE

A. Nature of the Case

This is a bankruptcy proceeding in which Fidelity Financial Services, Inc., ("hereinafter Fidelity") is attempting to enforce its rights as a secured creditor of the debtor, Denise Renee Beasley. The Trustee in Bankruptcy, Richard Fink, sought to avoid Fidelity's security interest as a preferential transfer under 11 U.S.C. § 547. The Bankruptcy Court, District Court and Eighth Circuit have all ruled in the Trustee's favor.

B. Course of Proceedings

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on November 18, 1994. United States Bankruptcy Court, Western District of Missouri: Case No. 94-43096-13. The Debtor converted the proceedings to a case under Chapter 13 of the Bankruptcy Code on February 21, 1995. On May 8, 1995, the Trustee filed a complaint to set aside Fidelity's lien on an automobile owned by the Debtor as a preferential transfer. The Honorable Frank W. Koger, Chief Bankruptcy Judge, United States District Court for the Western District of Missouri, sustained the Trustee's position and judgment was entered July 25, 1995 and amended on August 28, 1995. Fidelity filed its Notice of Appeal with the District Court on July 24, 1995, and filed an Amended Notice of Appeal with the District Court on July 25, 1995. The District Court had jurisdiction to hear Fidelity's appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The appeal was from an Order entered in a "core" proceeding referred to the Bankruptcy Judge under 28 U.S.C. § 157(b)(2) and was made to the district judge in the judicial district

in which the bankruptcy judge serves. For these reasons, the appeal was properly before the District Court.

On appeal to the District Court, Honorable Ortrie D. Smith, Judge, United States District Court, Western District of Missouri, Western Division, affirmed the Bankruptcy Court. United States District Court, Western District of Missouri: Case No. 95-0797-CV-W-3. Final judgment was entered in the District Court on February 9, 1996. Fidelity filed its Notice of Appeal to the Eighth Circuit Court of Appeals on February 9, 1996. The appeal to the Eighth Circuit was from a final judgment entered under 28 U.S.C. § 158(a). Accordingly, the Eighth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(d).

On November 27, 1996, the Eighth Circuit issued its opinion affirming the Bankruptcy Court and the District Court.

This Court granted Fidelity's Petition for Writ of Certiorari on May 12, 1997.

C. Statement of Relevant Facts

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #1ZDLT20A4R5133799, by Denise R. Beasley ("Beasley"), Debtor. At that time, Beasley executed and delivered a Note and Security Agreement to Fidelity. (Appendix to Petition, Exhibit F).

2. August 17, 1994 was the 229th day of 1994. (Appendix to Petition, Exhibit F).

3. On or about September 7, 1994 (21 days later), Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. (Appendix to Petition, Exhibit F).

4. The "blue slip" (which is the secured party's copy of the

Application for Title) was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994. (Appendix to Petition, Exhibit F).

5. At Fidelity's request, Susan M. Venturella, Senior Counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994 (26 days after creation of the debt and security interest). (Appendix to Petition, Exhibit F).

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee. (Appendix to Petition, Exhibit F).

7. November 18, 1994 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity. (Appendix to Petition, Exhibit F).

8. Fidelity is not an insider pursuant to 11 U.S.C. § 547. (Appendix to Petition, Exhibit F).

9. Fidelity filed a claim on December 16, 1994 in the amount of $14,670.15 but did not place a value on the security. (Appendix to Petition, Exhibit F).

10. The parties agree that the value of the vehicle is $14,000. (Appendix to Petition, Exhibit F).

11. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that § 301.600 R.S. Mo. provides that a lien is perfected:

. . . by the delivery to the Director of Revenue

> *[of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 days thereafter, otherwise as of the time of the delivery . . .*

(Emphasis added) (Appendix to Petition, Exhibit F).

12. The Trustee also demanded the Debtor surrender the vehicle or pay the estate $2,500 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the Trustee his fees, estimated at $500, over three months. (Appendix to Petition, Exhibit F).

13. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. § 1305(a)(4). (Appendix to Petition, Exhibit F).

14. On March 30, 1995, Fidelity filed its Objection to Confirmation under § 1325(a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim. (Appendix to Petition, Exhibit F).

15. Also on March 30, 1995, the Debtor announced at her § 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that should would either pay Fidelity or the unsecured creditors the value of the vehicle. (Appendix to Petition, Exhibit F).

16. Since the avoidance of the lien would benefit the estate the Trustee agreed to let the debtor's counsel represent him in the effort to determine whether Fidelity had obtained a preference. (Appendix to Petition, Exhibit F).

17. On or about May 8, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after the Debtor received possession of the security, that the lien was therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant. (Appendix to Petition, Exhibit F).

18. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(F) over which the Court has jurisdiction of the subject matter. (Appendix to Petition, Exhibit F).

19. On appeal, the District Court affirmed the Bankruptcy Court's decision.

20. On appeal to the Eighth Circuit, the Court of Appeals affirmed the District Court. United States Court of Appeals for the Eighth Circuit, Case No. 96-1430.

21. This Court granted Fidelity's Petition for Writ of Certiorari on May 12, 1997.

SUMMARY OF ARGUMENT

1. Fidelity acquired a purchase money security interest in the debtor's property on August 17, 1994. The stipulated facts show that Fidelity perfected its security interest in the Debtor's property within thirty days of the transfer. Pursuant to Mo. Rev. Stat. § 301.600.2, Fidelity's lien was perfected on August 17, 1994, the date of the transfer. Under § 547(e)(1)(B), "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien

that is superior to the interest of the transferee." Accordingly, Fidelity was perfected within the 20 day grace period set forth in § 547(c)(3)(B) and may avail itself of the enabling loan exception to the trustee's power to avoid preferences because no creditor could acquire a judicial lien superior to Fidelity's after August 17, 1994. The Eighth Circuit's decision that determination of perfection in preference cases should be made without reference to state grace periods is inconsistent with the plain language of § 547(e)(1)(B).

2. The Eighth Circuit's decision is inconsistent with decisions of the Tenth and Eleventh Circuits. The reasoning of the Tenth and Eleventh Circuits as set forth in *In re Hesser*, 984 F.2d 345 (10th Cir. 1993) and *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), *cert. denied*, *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991) should be adopted by this Court.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF 11 U.S.C. § 547(e)(1)(B).

Fidelity financed the Debtor's purchase of an automobile on August 17, 1994. At that time, Debtor executed a promissory note and security agreement in favor of Fidelity. Fidelity mailed the documents to perfect its lien to the Missouri Department of Revenue on September 7, 1994, or 21 days after the security interest was granted. The Department of Revenue received those documents 26 days after the date the Debtor signed the note and security agreement and delivered same to Fidelity. Because the last steps necessary to perfect Fidelity's lien in the Debtor's property were taken within 90 days of the date Debtor filed her petition in bankruptcy, the Trustee sought to avoid the security interest as a preferential transfer pursuant to 11 U.S.C. § 547(b).

Fidelity contends its security interest in the Debtor's automobile comes within one of the statutory exceptions to the trustee's power to avoid preferential transfers. 11 U.S.C. § 547(c)(3) provides that the Trustee may not avoid a transfer that creates a purchase money security interest in property acquired by the Debtor if the security interest is perfected on or before 20 days after the Debtor receives possession of the property. The Eighth Circuit ruled that Fidelity could not avail itself of this exception to the Trustee's avoidance power because Fidelity did not take the last steps necessary to perfect its security interest in the debtor's property within 20 days after the date Debtor took possession of the automobile.

Fidelity asserts that in reaching the conclusion that it did not perfect its security interest within the 20 day time period set forth in 11 U.S.C. § 547(c)(3)(B), the Eighth Circuit did not properly consider 11 U.S.C. § 547(e)(1)(B) which provides "for the purposes of this section . . . the transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of a transferee." In this case, Fidelity was perfected on April 17, 1994, the date of transfer, due to its compliance with Mo. Rev. Stat. § 301.600.2 which provides in relevant part:

> *A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, and application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within 30 days thereafter, otherwise as the time of the delivery.*

Due to Fidelity's compliance with Mo. Rev. Stat. § 361.600.2, no creditor on a simple contract could acquire a judicial lien superior to Fidelity's after August 17, 1994. However, the Eighth Circuit, citing with approval a decision by the Bankruptcy Appellate Panel for the Ninth Circuit, *In re Loken*, 175 B.R. 56 (BAP 9th Cir. 1994) concluded that determining perfection without reference to state grace periods is consistent with Congress's desire to have a "uniform rule throughout the country." It found persuasive the argument that it is not possible to say that other creditors cannot obtain rights superior to the transferee until the transferee takes the last step required by state law to perfect its security interest.

The Eighth Circuit decision is inconsistent with the plain language of § 547(e)(1)(B) which defines when a transfer is perfected for purposes of preference law under § 547. Where the resolution of a case depends upon construction of a statute and Congressional intent, this Court first looks to the statutory language and then to legislative history if the statutory language is unclear. *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197 (1991). The language of § 547(e)(1)(B) is clear. Contrary to the Eighth Circuit's assertion, § 547(e)(1)(B) requires reference to state grace periods in determining perfection.

II.

THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS BY THE TENTH AND ELEVENTH CIRCUITS.

Two Circuit Courts of Appeal have addressed this precise issue and have concluded that security interests in vehicles properly perfected under State vehicle perfection statutes are not subject to attack as preferential transfers even if the physical act of perfection occurs beyond the grace period set forth in § 547(c)(3)(B), since the security interest is deemed perfected under State law the moment that the security interest is created. In *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), *cert. denied, Moister v. General Motors*

Acceptance Corp., 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991). Alfred D. Busenlehner and Faye Elaine Busenlehner (the Busenlehners), Debtors, purchased a car and entered into an Installment Sales Contract and Security Agreement on March 31, 1988 which was subsequently assigned to GMAC. On April 13, 1988, the Georgia Department of Motor Vehicles received a "MV-1 Title Application", thereby perfecting GMAC's security interest under Georgia law (which provides that a security interest in a motor vehicle is perfected as of the time of its creation if the title application is delivered to the Department of Motor Vehicles within 20 days.) The Debtors filed a Petition under Chapter 7 of the Bankruptcy Code on April 26, 1988 and the Chapter 7 Trustee then brought an adversary action against GMAC to set aside GMAC's lien as a preferential transfer (because perfection was not accomplished within 10 days as required by § 547(c)(3). GMAC argued that the security interest was not avoidable because § 547(e)(1)(B) permits the use of State relation-back statutes. Hence, the physical act of perfection did not need to occur within the 10 days grace period so long as, under State law, the security interest was deemed perfected within that period. This case was decided prior to the 1994 amendments to the bankruptcy code which extended the grace period of § 547(c)(3) from 10 to 20 days.

The Bankruptcy Court sustained the Trustee's Motion for Summary Judgment, and the District court reversed. On appeal, the Eleventh Circuit affirmed the District Court, stating:

> *§ 547(c)(3) prevents Trustees from avoiding enabling loans that meet certain conditions. In the case at hand, the only dispute is whether the secured loan complied with the requirement that the loan be "perfected on or before 10 days after the debtor received possession" of the property. 11 U.S.C.A. § 547(c)(3)(B). The Trustee argues that the security interest was perfected on the 13th day following the signing of the security agreement. GMAC argues that*

under § 547(c) the physical act of perfecting a lien does not need to occur within the 10 day period as long as, under State law, the security interest is deemed perfected within that period. [Emphasis added.]

The issue that confronts us in this case is the meaning of § 547(c)(3)(B)'s phrase "perfected on or before 10 days". The Code defines the phrase in § 547(e)(1)(B). § 547(e) governs the timing, for preference purposes, when a transfer is made and when a transfer is perfected. This case presents this panel with a dispute over the latter event. § 547(e)(1)(B) states: "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

Thus, in order to determine when perfection occurs under § 547, it is necessary to ascertain when the perfected security interest can beat a judicial lien in a priority battle. As this court held in a related context, "this determination must be made by reference to State law". . . [citation omitted]

Therefore we must turn to Georgia State law to determine when the perfected security interest can beat a judicial lien in a priority battle . . . Georgia law states that a security interest in a motor vehicle is perfected as of the date of its creation if the delivery [to the Department of Motor Vehicles of the proper documents] is completed within 20 days . . . In the case at hand, the correct documents were delivered to the Commissioner within the

statutory 20 days. Under State law, the security interest was deemed to have been perfected the moment that the security interest was created . . .

Because the Bankruptcy Code adopts state law under § 547(e)(1)(B), the date of perfection for preference actions in this case is the date of the initial enabling loan. Therefore GMAC perfected the enabling loan within the necessary 10 day period.

This conclusion is supported by the policies underlying preference law. The goal of the drafters of this provision of the 1978 Bankruptcy Reform Act was to bring preference law "more into conformity with commercial practices and the Uniform Commercial law" [citation omitted]

Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow State Commercial Law their secured loans will be protected in Bankruptcy.

By limiting the effect of State relation-back statutes in Bankruptcy, legitimate commercial practices are penalized. To hold for the Trustee in this case may be beneficial in that it creates a larger estate to pay administrative expenses and unsecured claims . . . The creditor, moreover, lent the money in the expectation that the creditor's compliance with State law was sufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by

filing for Bankruptcy and avoiding this otherwise acceptable security interest.

In *In re Hesser*, 984 F.2d 345 (10th Cir. 1993), James and Doris Hesser (the Hessers), Debtors, purchased and took possession of a 1990 Toyota on April 16, 1990. The Hessers executed a Retail Installment Sales Contract and Security Agreement which was subsequently assigned to General Motors Acceptance Corporation (GMAC). On the date of purchase, the seller executed and delivered a "Lien Entry Form" to the motor license agent (Oklahoma law provides that perfection of a security interest in a vehicle relates back to the date of purchase if a lien entry form is presented to the Oklahoma Tax Commission or its agent within 15 days of purchase). The lien entry form was actually received by the Oklahoma Tax Commission on May 1, 1990 (the 15th day after purchase). On May 18, 1990, the Hessers filed a Petition under Chapter 7 of the Bankruptcy Code. The Chapter 7 Trustee then filed an action to set aside GMAC's security interest as a preference pursuant to 11 U.S.C. § 547(b) (because the transfer was allegedly "for or on account of an antecedent debt owed by the debtor before such transfer was made since same was perfected more than 10 days after the execution of the security agreement and the creation of the debt occurred prior to, and not contemporaneously with the transfer of the security interest). GMAC countered that the transfer was contemporaneous with the creation of the debt because, under Oklahoma State law, perfection automatically related back to the date of purchase. Further, said transfer was a contemporaneous exchange for new value. The Trustee filed a Motion for Summary Judgment which was granted by the Bankruptcy Court and affirmed by the District Court. On appeal, the Tenth Circuit reversed and stated:

> *The sole issue in dispute is the appropriate timing and method of the perfection of a security interest provided for in § 547 of the Bankruptcy Code. We agree with the 11th Circuit that the Bankruptcy Code adopts State*

> *law to determine the date of perfection under § 547(e)(1)(B) . . . [citation omitted]*
>
> *§ 547(e)(1)(B) . . . applies to the perfection of a transfer of a fixture or property other than real property and provides "for purposes of this § a transfer. . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee . . ."*
>
> ***Thus, in order to determine the date of perfection, it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle . . . This determination is made by reference to state law . . .***
>
> ***After the date of perfection is determined, the time of the transfer must be ascertained and must fit within the 10-day grace period provided in § 547(e)(2) . . . Thus, § 547(e) provides for a two step process: first, determine the date of perfection according to state law pursuant to § 547(e)(1)(A) or (B), and second, determine the time of transfer pursuant to § 547(e)(2).***
>
> *Because under Oklahoma law, GMAC's security interest was perfected on April 16, April 16 is also the date that GMAC's security interest was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract cannot acquire a judicial lien that is superior" to the secured creditor GMAC. Because the date of the perfection coincides with the date on which the security interest*

was granted, the transfer of the security interest was not "for or on account of an antecedent debt" 11 U.S.C. § 547(b)(2), and also was "perfected on or before 10 days after the debtor received possession of the property" 11 U.S.C. § 547(c)(3)(B). Therefore, because the Trustee cannot meet all of the elements necessary to avoid the transfer pursuant to § 547(b) and furthermore, GMAC can claim protection under § 547(c)(3), the transfer cannot be avoided by the Trustee. [Emphasis added.]

The Court in *In re Power*, 133 B.R. 242 (Bkrtcy. N.D. Okla. 1991), addressed the same issue and reached the same result. On March 7, 1991, Judi E. Beaumont (Beaumont), Debtor, purchased and took possession of a 1989 GMC pickup truck, and executed a Retail Installment Contract and Security Agreement (which was assigned to GMAC). GMAC perfected its interest by filing a lien entry form with the Oklahoma Tax Commission on March 22, 1991 (15 days later). On April 10, 1991, Beaumont filed a Chapter 7 Petition. Thereafter, the Chapter 7 Trustee filed a complaint to avoid GMAC's lien as a preferential transfer because the act of perfection did not occur within the 10 day grace period prescribed by 11 U.S.C. § 547(e)(2). GMAC argued that its lien perfection on Day 15 related back to Day 1 under Oklahoma State law and the granting of the security interest was therefore legally contemporaneous with the creation of the debt. Hence, no transfer was made on account of an antecedent debt.

The court granted Summary Judgment in favor of GMAC citing *In Re Busenlehner:*

> *[2] The exact issue before this Court was before the Eleventh Circuit, in In re Busenlehner, 918 F.2d 928, 930 (11th Cir. 1990). In this case, the Trustee brought an*

> *adversary proceeding against GMAC to recover a preference. GMAC had perfected its security interest in a motor vehicle thirteen days after the purchase and execution of the security agreement, but within the twenty-day grace period allowed by the state statute. The state statute provided, as does the Oklahoma Statute, that if perfected within the allotted time, the lien relates back to the day of execution of the security agreement. The Court held in favor of GMAC finding perfection related back to the date of the security agreement. Therefore, perfection occurred within 10 days of the transfer of the security interest and GMAC's lien is excepted from avoidance under 11 U.S.C. § 547(c)(3)(B) as not being on account of an antecedent debt. The creation of the debt and the transfer of an interest of the debtor in property as collateral for that debt happened contemporaneously.*
>
> • • •
>
> ***The Court points out that in the Hamilton case the applicable state statutes allowed a twenty-day grace period for perfection of the security interest but did not provide perfection to relate back to Day One, if the lien was perfected timely. In the Matter of Hamilton, 892 F.2d 1233, nn. 14-15.***
>
> *This Court believes the Bankruptcy Code clearly states that the transfer occurs on Day One if the lien is perfected within ten days.* ***Under Oklahoma law, the lien of GMAC was deemed perfected on Day One even though the physical act of perfection occurred on Day***

15. The Bankruptcy Code does not say the physical act of perfection has to occur within ten days; it just states that the lien must be perfected within ten days. Here, that requirement was met. No transfer of the Debtor's interest in property was made on account of an antecedent debt. Execution of the security interest, creation of the debt, and a transfer of Debtor's property happened at the same time and no avoidable preference occurred.

This argument is buttressed by reference to Bankruptcy Code § 547(e)(1)(B) which states:

> *(B) a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.*

> *In the present case, this means that transfer was complete when a judgment creditor of the debtor could not obtain an interest superior to the interest of GMAC. Under Oklahoma law, GMAC's security interest in the truck was perfected on Day one and no subsequent judgment creditor could obtain a superior interest in the truck.*

The case of *In re Burnett*, 14 B.R. 795 (Bkrtcy. E.D. Tenn. 1981) is also supportive. Raymond Burnett, Jr. (Burnett), Debtor, purchased and took possession of a truck on November 14, 1980. Burnett executed a Note and Security Agreement which was assigned to First Tennessee of Chattanooga (the Bank). On December 4, 1980, the Bank filed an Application for Title. On February 11, 1981, the Debtor filed a Petition under Chapter 7 of

the Bankruptcy Code and the Trustee thereafter initiated an adversary action to set aside the Bank's security interest as preferential. The Bank argued that despite its failure to file the Application for Title within 10 days, its security interest was always perfected because it filed within the 20 day grace period allowed under Tennessee State law. The Bankruptcy Court (Ralph H. Kelley, Bankruptcy Judge), while acknowledging that Congress intended for 10 days to be a uniform grace period, held that Congress must have intended perfection under § 547(c)(3) to include perfection as a matter of law by virtue of state relation-back statutes:

> *It may be easiest to compare interpretations. The one that agrees with Congress's intent depends primarily on the tense of the definition. A security interest "is perfected" when a creditor "cannot" acquire a superior judicial lien. This seems to require the court to look at the facts at any moment from that perspective. Suppose that a bank has a purchase money security interest that it has not filed to perfect, but the twenty day grace period has not expired. During the grace period and before the bank files, a creditor can possibly acquire a superior judicial lien. That depends on whether the bank actually does file within the grace period. If the bank does, then its security interest will have priority because its perfection will relate back to when the security interest attached, before the creditor acquired the judicial lien. But from the creditor's perspective, it could not know that was going to happen when it acquired its judicial lien.*

> *This interpretation is consistent with Congressional intent. For Article 9 security interests, perfection would begin when the last step necessary for perfection occurred, but*

perfection would not relate back to an earlier step in the process of perfection.

The best way of looking at the bank's argument is to consider the definition as referring to a period of time. On that theory, the definition means a security interest is perfected during any period of time when a creditor cannot acquire a superior judicial lien. The period of time can begin before the last step necessary for perfection occurs.

The court believes this interpretation is the more reasonable of the two. Though both interpretations are consistent with the wording of the definition, this one is less troublesome than the interpretation that agrees with Congress's intent. That interpretation strains the wording of the definition to conclude that the court must consider the facts from an earlier perspective, rather than as they turned out.

This interpretation is not objectionable on the basis of the floating lien cases. In those cases the courts held security interests perfected before they were perfected under the UCC. This preference statute was meant to overrule those cases. But the problem in this case is not that the definition will allow perfection to occur before perfection under the UCC. Perfection during the grace period, even by relation back, is perfection under the UCC.

Thus, the court agrees with the bank's argument. Since it perfected during the grace period, its security interest was perfected from

the time it attached, both under state law and under the definition of perfection in the preference statute. There was no transfer on account of an antecedent debt.

Many states have statutes that require lien notation on a Certificate of Title in order to perfect an interest in motor vehicles. Likewise, § 9-301 of the Uniform Commercial Code (which has been adopted in some form or other by virtually all states) clearly states that the filing provisions of Article 9 do not apply to purchase money security interests in motor vehicles. Thus, it is clear that Congress did not intend the 20 day relation-back period in § 547(c)(3) to apply to vehicles perfected under special State statutes exclusively governing perfection of interests in vehicles. Although the grace period in § 547(c)(3) for purchase money loans was changed from 10 days to 20 days in the 1994 amendments to the Bankruptcy Code because most states have adopted 20 day grace periods under their particular version of § 9-301 of the Uniform Commercial Code, no reference was made to State statutes *specifically governing perfection of interests in motor vehicles*, which often include special relation-back periods exclusively for automobile financing.

Further, a Senate debate on this precise issue reveals a plain and clear intent that the reasoning of *Busenlehner* and *Hesser* are consistent with Federal Bankruptcy Law.

Mr. Sasser: . . . I thought it would be advisable to clarify a related issue that has caused unnecessary litigation throughout the country and in my home State of Tennessee.

The issue is whether State laws that allow a longer period of time to perfect a lien by allowing the creation of the lien to "relate back" to an earlier date contravene the Federal Bankruptcy Act. While Federal bankruptcy courts have long

recognized that State law defines and governs the manner and timing of motor vehicle lien perfection, there has still been some dispute in the lower courts regarding State "relation back" statutes.

Under most state motor vehicle title perfection laws, if the requisite steps necessary for perfection are completed on a timely basis, the date of perfection "relates back" to the date the security interest was created or attached. These are commonly known as "relation back" laws. . . .

Although the new change in Federal law to 20 days would protect States like Tennessee, there are States that allow longer than 20 days to prefect the lien and have "relation back" laws that take into account each State's consideration of what is commercially reasonable and necessary to perfect a motor vehicle lien. For example, the documents necessary to perfect used car titles subject to payoff held by out-of-state institutions are not readily available. This causes a delay in the perfection process.

These "relation back" statutes protect the lien holder since the lien holder usually is not responsible for the delay. In addition, a 30 day "relation back" law is the model set out by the Uniform Vehicle Code and Model Traffic Ordinance.

Mr. Heflin: The Committee's decision to increase the time period to 20 days was proposed to conform bankruptcy law practices to most State's practices.

I would like to clarify just one point with the Senator from Tennessee, however. That is that while the date of perfection is determined by State law, including these "relation back" statutes, they do not affect the time of transfer pursuant to section 547. Would the Senator from Tennessee agree on that point.

Mr. Sasser: Yes indeed, Madam President. That would by my view also. The "relation back" provision merely relates to determining when a security interest in a motor vehicle is perfected in accordance with State law. Clarifying that "relation back" statutes are consistent with the Federal law does not change the uniformity of the Federal law. As the Chairman knows, Federal uniformity is keyed to the date on which the debtor receives possession of such property which then activates the running of the 20 day period under section 547.

Mr. Heflin: On this point, I wonder whether the Senator from Tennessee would cite any Federal court decisions as persuasive authority on this matter.

Mr. Sasser: . . . I would note for the Chairman *In Re Basenlehner*, 918 F.2nd 928 (11th Cir. 1990) (sic); *In Re Hesser*, 984 F.2nd 345 (10th Cir. 1993). The Eleventh Circuit came to a similar conclusion in the case of *In Re Howard*, 920 F.2nd 887 (11th Cir. 1991).

I would say to the Chairman that my purpose in this discussion is to establish that, although there is no statutory language to codify these Court cases, they are consistent with Federal Bankruptcy Law.

> Mr. Heflin: I would say to my colleague that it is appropriate at this time for the Senate to state its intent to confirm the interpretations of these Circuits.

140 Cong. Rec. S4536-37 (1994).

The applicable vehicle perfection statute in Missouri is Mo. Rev. Stat. § 301.600.2 (1994). This statute has exclusively governed perfection of motor vehicles in Missouri since 1965. Thus, Missouri has a long-standing special statute governing perfection of interests in automobiles which specifically provides for a 30-day relation-back period. Fidelity provided financing and took steps to perfect its security interest in compliance with the aforementioned long-standing statute and "in the expectation that the creditor's compliance with State law was sufficient to protect the loan. *Busenlehner, supra*. Under Missouri law, Fidelity's lien was deemed perfected on August 17, 1994 even though the physical act of perfection occurred 21 days later, since "perfection during the grace period, even by relation-back, is perfection under the UCC." *Burnett, supra*. August 17, 1994 is also the date that Fidelity's lien was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract [could not] acquire a judicial lien" superior to Fidelity. Because the date of perfection coincides with the date of creation, the transfer of the security interest was not "for or on account of an antecedent debt" under § 547(b)(2) and was also "perfected on or before 20 days after the Debtor received possession" of the property under 547(c)(3)(B). The Chapter 13 Trustee did not meet all of the elements necessary to avoid the transfer under § 547(b) and the transfer is not subject to avoidance. *Hesser, supra*.

Fidelity concedes that there is contrary authority. *See In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990); *In re Holder*, 892 F.2d 29 (4th Cir. 1989); *In the Matter of Tressler*, 771 F.2d 791 (3d Cir. 1983); *In re Loken*, 175 B.R. 56 (Bkrtcy. 9th Cir. 1994); *In re Holloway*, 132 B.R. 771 (Bkrtcy. N.D. Okla. 1991); *In re Scoviac*, 74 B.R. 635 (Bkrtcy. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445 (Bkrtcy. N.D. Tenn. 1984); *In re Walker*, 77 F.2d 322 (9th Cir. 1996).

However, few of these cases appear to involve interpretation of a long-standing State statute *exclusively* governing perfection of security interests in *automobiles* and *specifically* including a relation-back period for perfection of vehicles. The State statutes at issue in *Hamilton, Loken, Murray, Scoviac, Tressler* and *Holder* apparently did not have a specific relation-back provision under a separate vehicle perfection statute and the lienholder was therefore forced to rely on the grace period provided in § 9-301 of that particular State's version of the *Uniform Commercial Code*. Missouri itself has a 20-day grace period for non-vehicle purchase money loans (Mo. Rev. Stat. § 400.9-301).

The case of *In re Walker*, 161 B.R. 484 (Bkrtcy. D. Idaho 1993) is also distinguishable because *Walker* turned on the peculiar wording of Idaho's Motor Vehicle Statute, requiring filing of proper paperwork with the Department of Revenue, ***and notation*** of the security interest on the Certificate of Title. (Citing a 1982 State decision, which held that the date noted on the Certificate of Title was the date of perfection of creditor's security, in spite of the creditor's presentation of evidence that the documents had actually reached the agency earlier. As the Bankruptcy Court in *Walker* noted:

> *The court here adopts the same analysis and concludes that under the statute as well as a matter of administrative practicality, **the date on the title certificate constitutes the lender's perfection date**. Commercial reality demands that parties be able to rely upon the lien perfection information contained in the title certificate, just as they would rely upon the other facts shown on the title. **Great uncertainty would be injected into credit and other transactions involving motor vehicles if parties were allowed to impeach or contradict the lien recording information on title certificates with non-record facts. The statute***

reflects this policy by dictating that liens are deemed perfected according to the time noted on the certificate.

The date reflected on the Certificate of Title in the present case is the relation back date, August 17, 1994.

CONCLUSION

Fidelity's purchase money lien was properly perfected under the applicable Missouri motor-vehicle perfection statute, and is not subject to avoidance under § 547 of the Bankruptcy Code. The reasoning of the Tenth and Eleventh Circuits in *In re Hesser* and *In re Busenlehner*, should be adopted because they involve similar State statutes with specific relation-back periods for vehicles (separate and apart from the relation-back period provided for in § 9-301 of the Uniform Commercial Code). Moreover, lenders have been relying on the 30-day grace period provided for perfecting interests in motor vehicles in Missouri since 1965, and Debtors should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest.

The Eighth Circuit decision acknowledges that compliance with Mo. Rev. Stat. § 301.600.2 (1994) results in perfection as of the date of purchase and that Fidelity did, in fact, comply with the requirements of the Mo. Rev. Stat. § 301.600.2 (1994) such as to have its lien deemed perfected on the date of purchase. Again, the fact of the matter is that no creditor on a simple contract could acquire a judicial lien that was superior to Fidelity's interest after August 17, 1994, the date of the purchase. Nevertheless, the Eighth Circuit ruled that the state relation back statute should not apply when determining preferential transfers pursuant to 11 U.S.C. § 547. Fidelity contends the Eighth Circuit's holding in this regard is contrary to the plain language of 547(e)(1)(B) and moreover with the vast body of bankruptcy cases which have determined that state law governs with regard to matters of perfection of security interests.

Wherefore, for the foregoing reasons, Fidelity respectfully requests that this Court reverse the Eighth Circuit's decision below and hold that Fidelity satisfied its burden to show that it came within the enabling loan exception to the trustee's power to avoid preferences.

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No. 96-1370

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the bankruptcy preference law establish a uniform national relation-back period for the perfection of security interests, or does it defer to the vagaries of local law to give secured creditors an indefinite and unlimited period in which to perfect?

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SUMMARY OF ARGUMENT

The plain language of § 547(e)(2)(A)[1] establishes a uniform federal relation-back period during which secured creditors must complete the acts necessary for perfection of their security interests. This is the only reading of the statute that gives effect to the related § 547(c)(3) enabling loan defense and to the § 547(e)(2)(C)(ii) post-petition perfection provision. Further, it is the only reading that harmonizes § 547(e)(2)(A) with the § 362(b)(3) post-petition perfection exception to the automatic stay and the general relation-back provision of § 546(b). It is also the only interpretation that furthers the anti-secret lien policy of bankruptcy preference law. Finally, both the legislative history and the derivation of that provision from prior law confirm that the plain language interpretation of § 547(e)(2)(A) is what Congress intended.

ARGUMENT

I.

THE PLAIN MEANING OF THE STATUTE ESTABLISHES A UNIFORM FEDERAL RELATION-BACK PERIOD FOR PURCHASE MONEY SECURITY INTERESTS.

The complex "transfer timing" rules of the Bankruptcy Code's preference provisions date security interest transfers to the time when the security interest is perfected, unless that interest is perfected within the applicable 10-day and 20-day grace periods of § 547(e)(2)(A). If the interest is perfected within

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1. The Bankruptcy Code is codified at Title 11 of the United States Code. The text of this brief refers to sections of the "Bankruptcy Code" or "Code." These section references translate without alteration to section references in Title 11 of the United States Code.

the applicable § 547(e)(2)(A) grace period, then the preference transfer date relates back to the date of attachment (*i.e.* the date that the transfer takes effect between the parties). The transfer dates are critical both for determining two elements of the trustee's *prima facie* preference case: (1) whether the transfer occurs within the 90-day preference look-back period; and (2) whether it is a transfer for an "antecedent debt."

The pivotal issue in the instant case is whether § 547(e)(2)(A) uses perfection in its ordinary sense to refer to the date when the last act required for perfection under applicable state law was performed, or whether it also incorporates the state law "relation-back" fiction to deem perfection to have occurred at an earlier point in time.

A. The Language Of The Statute Has Been Uniformly Interpreted To Establish A Uniform Relation-Back Period.

Although both Petitioner and Amici Curiae contend that their position is based on the plain language of the Bankruptcy Code, their arguments overlook the fact that the 1994 amendments changed the language of § 547(e)(2)(A) that both they and the cases cited in their briefs rely upon. *See* Bankruptcy Reform Act of 1994, § 203(1, 2), Pub. L. No. 103-393, 108 Stat. 4106 (1994). The 1994 amendments added the language "except as provided in subsection (c)(3)(B)" to the end of § 547(e)(2)(A). This new cross-reference to the § 547(c)(3) "enabling loan" exception, pulls purchase money security interests like Petitioner's out of the general rule of § 547(e)(2)(A) and places them squarely within the 20-day period established by the 1994 amendment's revision to § 547(c)(3)(B). Petitioner has not cited, and Respondent is not aware of a single case interpreting the revised language in the manner that Petitioner asserts is so plain.

True, there was some confusion about whether

§ 547(e)(2)(A) incorporated the varying state law relation-back periods prior to the 1994 amendment. While recognizing the clear Congressional intent to establish a uniform 10-day relation-back period, and while acknowledging that the statutory language conformed to that intent, the bankruptcy court in *In re Burnette*, 14 B.R. 795 (Bankr. E.D. Tenn. 1981), relied on policy arguments to hold that § 547(e) incorporated state law relation-back periods.[2] That view was followed and adopted by the Tenth and Eleventh Circuits. *See Webb v. GMAC (In re Hesser)*, 984 F.2d 345 (10th Cir. 1993); *GMAC v. Busenlehner (In re Busenlehner)*, 918 F.2d 928, 931 (11th Cir. 1990), *cert. denied*, *Moister v. GMAC*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991).[3] In contrast, the Fifth and Ninth Circuits deferred to Congressional intent and held that the Bankruptcy Code established a uniform federal relation-back period. *See Pongetti v. GMAC (In re Locklin)*, 101 F.3d 435, 442 (5th Cir. 1996); *Fitzgerald v. First Security Bank of Idaho (In re Walker)*, 77 F.3d 322, 323 (9th Cir. 1996); *Howard Thornton Ford, Inc. v. Fitzpatrick (In re Hamilton)*, 892 F.2d 1230, 1235 (5th Cir. 1990). The great majority of bankruptcy courts agreed.[4]

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2. After an exhaustive review of the legislative history, the *Burnette* court stated:

> It is evident that Congress did not intend for state law grace periods to be relevant under the preference statute. There was to be a uniform rule throughout the nation. In any jurisdiction, a transferee was to have only ten days to perfect a transfer and thereby avoid the antecedent debt problem.

Id. at 801.

3. *Busenlehner* was followed by one bankruptcy court. *See In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991). In addition, one case appears to adopt the relation-back theory without discussion. *See In re Harley*, 41 B.R. 276, 281 (Bankr. N.D. Ga. 1984).

4. *See Long v. Joe Romania Chevrolet, Inc. (In re Loken)*, 175 B.R. 56, (Cont'd)

Further, even under the prior language, the leading scholars and treatise writers had no difficulty concluding that § 547(e)(2)(A) established a uniform 10-day period for the perfection of purchase money security interests, and that *Burnette*, *Hesser*, and *Busenlehner* were incorrectly decided. As Barkley Clark, author of a leading treatise on secured transactions said of the pre-1994 version of § 547(e)(2)(A):

> It would seem that the Fifth Circuit has the better of the argument. The 10-day rule found in the preference provision is *clear and unambiguous*. It was drafted at a time when it conformed to the UCC provision. The fact that the UCC has since been liberalized does not change the *plain language* of the federal statute. And although § 547(e)(1)(B) defers to state law in supporting the relation-back concept, reading it as the Eleventh Circuit did completely ignores the 10-day provision. If the Bankruptcy Code is to be amended to make it conform more closely to the liberalized UCC, the amendment should come from Congress and not the courts.

Barkley Clark, *The Law of Secured Transactions* ¶ 6.03[2][b] and 6-39 (rev. ed. 1993) (emphasis added).

(Cont'd)

61-62 (9th Cir. B.A.P. 1994); *In re Holloway*, 132 B.R. 771, 773-75 (Bankr. N.D. Okla. 1991); *In re Carson*, 119 B.R. 264, 267 (Bankr. E.D. Okla. 1990); *In re Holder*, 94 B.R. 395, 398-99 (Bankr. M.D. N.C. 1988), *aff'd on other grounds*, 94 B.R. 394 (M.D. N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989); *In re Scoviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 448, 451 (Bankr. M.D. Tenn.), *aff'd*, 33 B.R. 112 (M.D. Tenn. 1983).

Other scholars and treatise writers agreed with Clark's conclusion that the pre-1994 preference timing rules of § 547(e)(2)(A) established a uniform federal grace period for perfection. In their treatise on bankruptcy law, Epstein, Nickles, and White concluded that "the critical inquiry under § 547(e) is whether and when the necessary steps [to perfect] have been taken," and that the 10-day rule of § 547(e) is "preemptive and controlling" even when the state law relation-back period is longer. David G. Epstein, Steve H. Nickles, & James J. White, *Bankruptcy* § 6-12, pp. 547, 550 (Practitioners ed. 1992). Both Collier on Bankruptcy and the White and Summers treatise on the Uniform Commercial Code agreed that state law relation-back rules were not relevant in preference actions. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 25-7, pp. 447-48 (3d ed. 1988); 4 L. King, *Collier on Bankruptcy* ¶ 547.11, pp. 547-54, n. 2, *reprinted in In re Walker*, 161 B.R. at 496. Other scholars criticized the *Burnette* interpretation not only because of its disregard for Congressional intent, but also because of the violence its reading of § 547(e)(2)(A) did to the intricately designed and interrelated statutory provisions. *See* Thomas M. Ward & Jay A. Shulman, *In Defense of the Bankruptcy Code's Radical Integration of the Preference Rules Affecting Commercial Financing*, 61 Wash. U.L.Q. 1, 87 n. 277 (1983) (referring to *Burnette's* refusal to follow the Congressional design of § 547(e) as "a stunning judicial tour de force"); Irving A. Breitowitz, *Article 9 Security Interests as Voidable Preferences*, 3 Cardozo L. Rev. 357, 394-398 (1982) (*Burnette's* reading of § 547(e)(2)(A) rendered § 547(e)(2)(C)(ii) mere surplusage).

As Clark suggested, the liberalizing change ultimately did come from Congress in the form of the 1994 amendments, which govern this case. Congress amended the § 547(c)(3) enabling loan exception to expand its safe harbor period from 10 to 20 days, thus giving purchase money secured creditors 20 days

following the date of the debtor's possession of the collateral in which to perfect. *See* Bankruptcy Reform Act of 1994, § 203(1). Congress also amended § 547(e)(2)(A) to add an express cross-reference to the newly amended 20-day provision of § 547(c)(3)(B). *See* Bankruptcy Reform Act of 1994, § 203(2). While *Burnette's* incorporation of state law relation-back periods into the term "perfected" as used in the pre-amendment version of § 547(e)(2)(A) resulted in a strained reading of the statute, the changes made by the 1994 amendments render such a reading patently absurd.

This has been the uniform interpretation of the post-1994 version of § 547 by the courts, treatise writers, and scholars. Not a single published opinion adopts Petitioner's interpretation of the current language of § 547(e)(2)(A). Instead, the Eighth Circuit, in the opinion appealed from, the Ninth Circuit, and the bankruptcy courts have uniformly concluded that § 547(e)(2)(A) means what it says — that a uniform federal grace period applies in determining the time of transfer for preference purposes. *See Fink v. Fidelity Financial Service, Inc.*, 102 F.3d 334, 335 (8th Cir. 1996), *cert. granted*, __ U.S. __, 117 S. Ct. 1690, 137 L. Ed. 2d 818 (1997); *Walker*, 77 F.3d at 324 (9th Cir. 1996) (*dicta* referring to the 1994 amendments); *Loken*, 175 B.R. at 62 (9th B.A.P. 1994) (*dicta* referring to the 1994 amendments); *In re Smallwood*, 204 B.R. 519, 520 (Bankr. E.D. Ky. 1997); *In re Ross*, 193 B.R. 902, 904 (Bankr. W.D. Mo. 1996); *see also In re W.T. Vick Lumber Co., Inc.*, 179 B.R. 283, 290-91 (Bankr. N.D. Ala. 1995) (*dicta* critical of *Busenlehner*).

Further, the major treatise writers on bankruptcy and secured transactions read the current law as establishing a uniform 20-day perfection period for purchase money security interests, rather than a variable period that turns on the vagaries of state law. Clark reads the amendments to reject the incorporation of

state timing rules and "to continue having the Bankruptcy Code itself dictate the applicable grace periods." Clark, *Law of Secured Transactions* at ¶ S6.03[2][b][i], p. S6-6 (1996 Supp.); *accord* James J. Wright & Robert S. Summers, *Uniform Commercial Code* § 32-4, pp. 258-59, n. 13 (4th ed. 1995) (rejecting Petitioner's argument as misconstruing the participle "perfected" in § 547(e)(2)(A) and as leaving "very little for section 547(e)(2)(B) to do").

Collier on Bankruptcy recognizes that the new conforming amendment to § 547(e)(2)(A) clarified whatever ambiguity may have existed under the prior version. 5 L. King, *Collier on Bankruptcy* ¶ 547.05, p. 547-69, n. 1 (15 ed. rev. 1997). Collier's flatly rejects the argument that the current version of § 547 incorporates state law relation-back periods:

> If the financing statement is filed more than 20 days after the debtor receives possession of the collateral, the transfer (security interest) will be deemed perfected on the date of filing without the assistance of the relation back doctrine. In addition, the secured party will not be saved by § 547(e)(2)(A) because it perfected more than 20 days after the transfer took place.

Id. at ¶ 547.08[1], pp. 547-89.

Although there has been little time for much other scholarly commentary on the 1994 amendments, Professor Zinnecker's exhaustive analysis of the current language of § 547 and related provisions, the legislative history, and the policies underlying preference law similarly concludes that § 547(e) establishes a uniform federal relation-back period. *See* Timothy R. Zinnecker, *Purchase Money Security Interests in the Preference Zone:*

Questions Answered and Questions Raised by the 1994 Amendments to the Bankruptcy Code § 547, 62 Mo. L. Rev. 47 (1997).

Thus, rather than supporting Petitioner's position, the plain meaning of the post-amendment version of § 547(e)(2)(A) establishes a uniform 20-day federal safe harbor for the perfection of purchase money security interests. The only supporting authority cited by Petitioner or Amici Curiae that relates to the current language of § 547 is an ambiguous reference in colloquy between two Senators. Even if read as Petitioner suggests, that dialogue is refuted by both the language of the amendment and the more authoritative official committee report that accompanied the bill. *See* H.R. Rep. No. 103-835, 103d Cong., 2d Sess. 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

B. The Term "Perfected" As Used In § 547(e)(2)(A) Refers To The Performance Of The Acts Necessary To Perfect A Security Interest.

The plain meaning of Bankruptcy Code provisions must be derived from reading the statute as a whole, and not from pulling a single word or phrase out of context. *See United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740, 748 (1988). While Petitioner focuses narrowly on the word "perfected" in § 547(e)(2)(A) and asserts that its plain meaning refers to the *effect* of becoming perfected, a careful reading of that subsection strongly suggests that the term is used to refer instead to the performance of those *actions* required by state law in order to become perfected. That interpretation is confirmed by reading § 547(e)(2)(A) in the context of the related sub-sections of § 547. And, it becomes inescapable when § 547(e)(2)(A) is read in the context of its relationship to the broader Bankruptcy Code

scheme for dealing with state law relation-back rules, as embodied in § 362(b)(3) and § 546(b).

1. Subsection 547(e)(2)(A) Refers To A Time Period Between Those Actions Necessary To Create A Security Interest And Those Necessary To Perfect It.

Current § 547(e) is the result of almost 100 years of evolution of the bankruptcy rules designed to deal with the problem of secret liens. The anti-secret lien policy is separate and distinct from the more commonly discussed preference law policies of furthering distributive equity and discouraging last minute asset grabs. *See* Epstein, *Bankruptcy* at § 6-11, p. 542.

Legal responses to the problem of secret liens and the evils that can arise from the debtor's ostensible ownership of assets that are encumbered by undisclosed third-party interests date back to the earliest reported fraudulent conveyance and preference opinion of *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601), where the debtor preferred one creditor over another by transferring a secret title to assets, while retaining possession. There the court reasoned, *inter alia*, that the secret interest was a fraud on creditors because it created the false impression that the debtor had unencumbered assets.

The anti-secret lien policy is not unique to bankruptcy law. Indeed, it is the very foundation for the U.C.C. requirement that security interests must be perfected in order to gain priority over competing claimants to the collateral. *See generally*, 1 Grant Gilmore, *Security Interests in Personal Property* § 15.1 (1965). Further, just like the anti-secret lien provisions of bankruptcy preference law, the U.C.C. also imposes a penalty for failure to perfect:

> The rules for subordination of

> unperfected security interests have a purpose — in common with similar rules in all filing and recording systems — to impose sanctions for not adhering to the filing or recording requirements. Such rules are necessary to make the system effective and enforce the policy against secret liens.

Official Comment 9, U.C.C. § 9-301 (1972).

The bankruptcy law embodiment of this anti-secret lien policy dates to the Bankruptcy Act of 1898, where Congress sought to discourage secret liens by imposing bankruptcy consequences on transferees who delay complying with non-bankruptcy notoriety requirements. Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 750 (1985). Beginning in 1903, Congress settled upon the solution of postdating secret transfers and converting them into voidable preferences. Breitowitz, 3 Cardozo L. Rev. at 378.

This solution is carried forward in the elaborate, and highly technical timing rules of § 547(e). The general rule of § 547(e) for cases involving personal property is found in § 547(e)(2)(B), which provides that the transfer will be deemed to have occurred for preference purposes at the time of perfection. Epstein, *Bankruptcy* at § 6-11, p. 543. The exception is found in § 547(e)(2)(A), which provides that the transfer will be deemed to occur at the time of attachment (the effective date) if perfection takes place within 10 days of attachment, or, for purchase money security interests, within 20 days of the debtor's possession. *Id.* The precise scope of that exception is at issue in this case.

Section 547(e)(2) provides that a transfer is made:

> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);
>
> (B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or
>
> (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —
>
> > (i) the commencement of the case; or
> >
> > (ii) 10 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2).

As discussed elsewhere in this brief, the express cross-reference to the enabling loan exception in subsection (c)(3)(B) refutes Petitioner's reading of § 547(e)(2)(A) as an open-ended provision that incorporates varying state law relation-back periods. However, even without the cross-reference, the plain reading of the statutory language refers to the time when all of the actions required for perfection are completed, and not to the effect of those actions once taken.

First, in its common and ordinary meaning the term "perfected" means the completion of certain required actions. Identical "is perfected" language is found in § 9-303(1) of the

U.C.C., which was the backdrop against which the § 547(e) rules were drafted. Under that section of the U.C.C., "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken." Uniform Commercial Code § 9-303(1) (1972).

Second, the language of both subsections (A) and (B) of § 547(e)(2) refer to specific points in time when the interest has become perfected: subsection (A) says "perfected at, or within 10 days after;" while subsection (B) uses the language "time such transfer is perfected" and "perfected after such 10 days." When a creditor waits until the 25th day to complete the actions necessary for perfection, that creditor's interest was not yet perfected on day one, or on day two, or on day 24. The creditor's interest first became perfected on day 25. And, whatever the retroactive effect of the actions taken on the 25th, the creditor's interest was not perfected prior to day 25. The Petitioner's attempted distinction between act and status misses the point that the creditor did not even have the status of perfection on day 24. The real distinction between the differing interpretations of § 547(e)(2) is a distinction between act and effect. In fact, the status of a purchase money secured creditor cannot even be determined until the time when the acts necessary for perfection have occurred, although once those actions do occur, the effect of perfection may relate back to the time of attachment.[5] Breitowitz, 3 Cardozo L. Rev. at 395. Thus, for preference purposes the transfer took place on day 25.

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5. Similarly, Petitioner's attempt to distinguish this case based on the unique use of the term "perfected" in the Missouri motor vehicle act must be rejected. *See* Brief of Petitioner at 27. Whether it refers to actions or effects, federal law supplies the meaning of the term "perfected" in § 547(e)(2). *See Barnhill v. Johnson*, 503 U.S. 393, 397, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39, 46 (1992) (federal law determines what is a transfer and when it is complete). It does not turn on a particular state statute's declaration of what that term means for state law purposes.

Third, Congress clearly knew how to distinguish between actions and the effects of those actions. As the first seven words of § 547(e)(2)(A) demonstrate, Congress chose to use the *effective* date of attachment for the point in time that starts the running of the 10-day period. In contrast, Congress chose the actual date of perfection as the end point of that period. Had Congress intended to incorporate state law relation-back rules into the determination of the perfection date, the language of the perfection clauses of subsections (A) and (B) would have paralleled the language of the attachment clause. For example, the perfection clause of § 547(e)(2)(A) should have read "if perfection of such transfer takes effect at, or within 10 days after such time. . . ."

Petitioner's reliance on the § 547(e)(1)(B) definition of perfection is equally unavailing. The § 547(e)(1) definitions merely identify the type of entity against whom the transfer must be perfected in order to survive preference attack. This provision is necessary because non-bankruptcy law provides differing levels of protection against lien creditors, competing secured creditors, and buyers; and because state law may require different actions to perfect an interest against each type of competing claimant. Thus, § 547(e)(1) carries forward the prior law's two-pronged approach of using a bona fide purchaser test for real property transfers and a lien creditor test for personal property transfers. *See generally*, Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan. L. Rev. 3, 92, *et seq.* (1986) (tracing the evolution of the preference timing rules).

Like the "is perfected" language of § 547(e)(2), the "when" language of § 547(e)(1) refers to the completion of all of the steps required for perfection against the relevant type of entity. Using the above example of a security interest perfected on day 25, *when* is it first possible to establish that a lien creditor

"*cannot* acquire an interest that is superior to the interest" of the secured creditor? The term "cannot" requires a determination of the moment in time when a judicial lien creditor is barred from obtaining superior rights. *Beasley*, 102 F.3d at 335; *Loken*, 175 B.R. at 62. Until the date when the creditor actually perfects it is *possible* for a lien creditor to acquire a superior interest. Thus, the perfection date under § 547(e)(1)(B) is the 25th day, whether or not the act of perfection has a relation-back effect. Petitioner reads § 547(e)(1)(B) to back-date perfection to the point in time when a lien creditor "might not be able to acquire" a superior interest. Such a reading presumes perfection during the entire state law relation-back period. That creates an absurd result in those cases where the secured creditor perfects after the relation-back period has expired. In such cases, the secured creditor would be "perfected" during the relation-back period, but then become unperfected upon its expiration.

If Petitioner's response to this point is that § 547(e)(1)(B) should be applied retrospectively using 20/20 hindsight based on subsequent events, the question then becomes why the statute says "cannot acquire" instead of "could not have acquired." Even *Burnette* acknowledges that the grammatical tense of the language "seems to require the court to look at the facts at any moment from that perspective," and that "[t]his interpretation is consistent with Congressional intent." *Burnette*, 14 B.R. at 801.

2. Section 547(c)(3) And Section 547(e)(2)(C)(ii) Must Be Given Effect.

It is a cardinal rule of statutory construction that a statute should be interpreted to give effect to all of its provisions. *See, e.g., Citizens Bank of Maryland v. Strumpf*, __ U.S. __, __, 116 S. Ct. 286, 289-90, 133 L. Ed. 2d 258, 264 (1995); *Timbers*, 484 U.S. at 371, 108 S. Ct. at 630, 98 L. Ed. 2d at 748; *Colautti v.*

Franklin, 439 U.S. 379, 392, 99 S. Ct. 675, 684, 58 L. Ed. 2d 596, 607 (1979). Petitioner's interpretation of § 547(e)(2)(A) nullifies both the timing rule of § 547(e)(2)(C)(ii) and the enabling loan exception of § 547(c)(3).

While subsections (A) and (B) of § 547(e)(2) base the general timing rules for preferences on time of perfection, subsection (C) deals with the special case of transfers that have not yet been perfected as of the date of bankruptcy. The general rule, found in § 547(e)(2)(C), deems such transfers to have been made immediately before the date of the filing of the bankruptcy petition. This rule furthers the anti-secret lien policy by pulling the transfer of an unperfected interest into the pre-petition preference period so that it can be avoided as a preference. The exception to this rule is § 547(e)(2)(C)(ii). Under that provision, the general timing rule of § 547(e)(2)(C) applies only "if such transfer is not perfected at the later of the commencement of the case; or 10 days after such transfer takes effect between the transferor and the transferee." This 10-day provision ties into the basic § 547(e)(2)(A) timing provision and permits timely post-petition perfection to relate the transfer back to a pre-petition attachment date.

However, because of the trustee's power to avoid unperfected security interests under the § 544 "strong arm" provision, post-petition perfection under § 547(e)(2)(C)(ii) can apply to preserve a transfer only where the act of perfection has a relation-back effect. Breitowitz, 3 Cardozo L. Rev. at 397. But, if Petitioner's reading of the statute is correct, then in all relation-back situations, the security interest would be "perfected" at the time of attachment, which is a pre-petition point in time. Thus, "there would be no situation where post-petition compliance with section 547(e)(2)(C) would ever be necessary." *Id.* Further, the § 547(e)(2)(C) reference to the possibility of post-petition perfection confirms that it is the act

of perfection that governs. The only reading of the statute that gives full effect to all three subsections of § 547(e)(2) is one that interprets the term "perfected" to mean completion of the actions required for perfection.

Similarly, Petitioner's reading of § 547(e)(2)(A) renders the § 547(c)(3) enabling loan exception a nullity. Contrary to Petitioner's view, neither the general perfection definition of § 547(e)(1)(B) nor the basic timing language of § 547(e)(2)(A) deal with state law relation-back periods granted to purchase money lenders. Instead, Congress crafted a specific provision to accommodate such rules. Thus, § 547(c)(3) establishes a defense to the trustee's preference power for enabling loans that satisfy the conditions of that section. *See generally*, Countryman, 38 Vand. L. Rev. at 776-79. Although § 547(c)(3) protects most security interests that qualify as purchase money security interests under U.C.C. § 9-107, it is important to note that the requirements of § 547(c)(3)(A) are more stringent than those of the U.C.C. In addition, in order to qualify for the enabling loan defense, the security interest must be perfected within the grace period provided by § 547(c)(3)(B). Prior to the 1994 amendments, that grace period tracked the 10-day uniform provision of the U.C.C. § 9-301(2) purchase money security interest relation-back period. The 1994 amendments extended the grace period to 20 days in response to a trend in many states of adopting longer non-uniform grace periods in U.C.C. § 9-301(2). *See* H.R. Rep. No. 103-835 at 45, 1994 U.S.C.C.A.N. at 3354; Clark, *Law of Secured Transactions* at ¶ S6.03[2][c], p. S6-6. Thus, rather than defer to state law, § 547(c)(3) both limits the class of transfers that can take advantage of the relation-back concept and sets a uniform grace period for the perfection of such transfers. Congress' preference for a uniform period is reflected both in § 547(c)(3)(B)'s limitation of the grace period to 20-days in those situations where a longer state law period applies, and in its expansion of the grace period to 20

days in those cases where the state law period is shorter. *See In re Smallwood*, 204 B.R. at 520 (secured creditor protected by 20-day provision even though state law relation-back period was shorter).

Even if Petitioner's reading of the general timing rules of § 547(e)(2)(A) were plausible, the more specific provisions of § 547(c)(3) would control. Petitioner's interpretation of § 547(e)(2)(A) simply cannot be reconciled with § 547(c)(3). First, § 547(c)(3)(B) contains the same "is perfected" language as § 547(e)(2)(A). Thus, the enabling loan exception applies only to a security interest "that is perfected on or before 20 days after the debtor receives possession" of the collateral. If that language refers to the effect of perfection, rather than the act of perfection, then the amendment was unnecessary because the non-uniform state law relation-back rules would already operate to date perfection within the 10-day grace period of the pre-amendment version of the § 547(c)(3)(B) enabling loan exception.

Similarly, if state law relation-back concepts are incorporated into the § 547(e)(2)(A) timing rule, then the entire § 547(c)(3) enabling loan defense is unnecessary. *See* Zinnecker, 62 Mo. L. Rev. at 83. By relating perfection, and thus the time of transfer, back to the date of attachment, the § 547(b)(2) "antecedent debt" requirement for a preference would be negated in almost all purchase money situations. Thus, there would be no preference to trigger the need for a defense. And, in the rare factual context where an antecedent debt did arise, the § 547(c)(1) "contemporaneous exchange" defense[6] would provide ample protection. Petitioner fails to explain what purpose § 547(c)(3) serves if its interpretation of § 547(e)(2)(A) is adopted.

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6. Section 547(c)(1) protects a transfer that was intended to be a contemporaneous exchange for new value and that was in fact a substantially contemporaneous exchange.

The only sensible way to read the related § 547 provisions is to interpret the term "perfected" to refer to the act of perfection. In this way the timing rules of all three subsections of § 547(e)(2) are given effect. Such a reading also gives effect to both § 547(c)(3) and the cross-reference to that section that was added to § 547(e)(2)(A). The § 547(e)(2)(A) cross-reference to § 547(c)(3)(B) creates an exception to the usual 10-day rule and establishes the attachment date as the date of transfer for enabling loans that both satisfy the requirements of § 547(c)(3)(A)[7] and that are perfected within 20 days of the debtor's possession of the collateral. While that alone will defeat the antecedent debt element of the trustee's *prima facie* case in most situations, the § 547(c)(3) defense will protect any remaining enabling loans, so long as the act of perfection occurred within the 20-day grace period.

C. Congress Expressly Rejected The Incorporation Of Relation-Back Periods Into Preference Law.

Congress was well aware of the need to balance the conflicting interests of bankruptcy law and the legitimate state law interests reflected in relation-back rules. It chose to address that issue in § 546 of the Bankruptcy Code, which deals with a variety of limitations on the trustee's avoiding powers. Subsection 546(b) provides, in relevant part:

> (1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that —
>
> (a) permits perfection of an interest in property to be effective against an

7. The § 547(c)(3)(B) reference to "such property" incorporates the § 547(c)(3)(A) enabling loan requirements.

> entity that acquires rights in such property before the date of perfection;
>
> * * *

11 U.S.C. § 546(b).

Thus, Congress knew how to incorporate and defer to state law relation-back rules. Further, it actually chose to do so in connection with the trustee's "strong arm" power under § 544, the statutory lien power under § 545, and the power to avoid post-petition transfers under § 549. Conspicuously absent from § 546(b) list is the trustee's § 547 preference power. Under the maxim *expressio unius est exclusio alterius*, that omission means that the trustee's preference power is not subject to relation-back rules. *See In re Walker*, 161 B.R. 484, 497 (Bankr. D. Idaho 1993), *aff'd* 77 F.3d 322 (9th Cir. 1996); *Murray*, 27 B.R. at 448; Epstein, *Bankruptcy* at § 3-18, p. 202. Therefore, Petitioner's argument that § 547 incorporates state law relation-back rules must be rejected.

Section 546(b) also refutes Petitioner's interpretation of the 1994 amendments. The simple addition of § 547 to the § 546(b) list would have been sufficient had Congress intended to defer to state law relation-back rules and thereby insulate from preference attack any purchase money security interest perfected within the relevant state law grace period. Congress instead chose to substitute a uniform federal 20-day grace period.

Finally, the language of § 546(b) confirms that the term "perfection" relates to the act of perfection, and not to its effect. Section § 546(b) speaks of laws that permit "perfection . . . to be effective . . . before the date of perfection." If the Bankruptcy Code uses perfection to refer to the effect of perfection, then the "date of perfection" under § 546(b) would be the *effective*

date of perfection. But, if that were so, then there never would be a case where perfection could be effective before the date of perfection, and § 546(b) would be a nullity. Clearly, § 546(b) refers to two different points in time, with the term "perfection" being used to refer to the time when the act of perfection occurs. Both § 547(c)(2)(A)'s use of the phrase "takes effect" and § 546(b)'s use of the term "effective" show that the Bankruptcy Code specifies when a legal fiction like retroactive effect is employed. The absence of such language in connection with § 547(e)(2)'s use of the term "perfected" shows that it is the act of perfection that controls in § 547(e)(2)(A).

D. Section 362(b)(3) Must Be Given Effect

The final piece of the Bankruptcy Code's scheme for dealing with relation-back rules is supplied by § 362(b)(3). Although § 546(b) subjects the trustee's powers under § 544, § 545, and § 549 to state law relation-back rules, and limited preference protection is granted to related-back purchase money security interests under § 547(c)(3) and § 547(e)(2)(C)(ii), those provisions would be ineffective if the § 362 automatic stay prevented the secured creditor from taking the actions necessary to perfect its interest. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837-38. Thus, § 362(b)(3) creates an exception to the automatic stay for "any act to perfect . . . to the extent that such act is accomplished within the period provided under section 547(e)(2)(A)." Since both § 547(e)(2)(A) and § 547(e)(2)(C)(ii) specify identical 10-day periods that run from attachment, the automatic stay exception of § 362(b)(3) dovetails with the post-petition perfection rule of § 547(e)(2)(C)(ii) to permit a purchase money lender to perfect during the § 547(e)(2)(C)(ii) period without fear of violating the automatic stay. Further, since the 1994 amendments extended the § 547(e)(2)(A) period to 20 days from possession for enabling loans, § 362(b)(3) also creates a

20-day exception to the automatic stay for enabling lenders, which dates from possession.[8]

Section 362(b)(3) speaks of accomplishing an act "within the period provided under § 547(e)(2)(A)." However, § 547(e)(2)(A) does not establish a set period of time like the 90-day preference look-back period in § 547(b)(4)(A). Instead, it speaks in terms of when a transfer "is perfected." The two sections mesh nicely only if § 547(e)(2)(A) is read as setting forth a period of time within which the *act* of perfection must occur. *See* Epstein, *Bankruptcy* at § 3-18, p. 202. Thus, the act permitted by § 362(b)(3) must be performed within the time to act established by § 547(e)(2)(A).

Further, since the only interests that can be validated by post-petition perfection are those that have the benefit of relation-back rules (*see* Breitowitz, 3 Cardozo L. Rev. at 393), the Petitioner's interpretation of § 547(e)(2)(A) causes the perfection date to collapse into the attachment date. There would thus be no period of time created by § 547(3)(2)(A) in the very class of transfers that § 362(b)(3) was designed to protect. At a minimum, this forces a tortured reading of § 362(b)(3). Alternatively, Petitioner's interpretation of § 547(e)(2)(A) could create an open-ended period of time for post-petition perfection. For example, if § 547(e)(2)(A) refers to the *effective* date of perfection, then § 362(b)(3) merely requires that the act to perfect be accomplished within the period that would cause perfection to be effective within 10 days of attachment (or 20

8. If the post-petition perfection of an enabling loan occurs more than 10 days after attachment, but less than 20 days after possession, then § 547(e)(2)(C)(ii) would not apply. Thus, § 547(e)(2)(C)(i) would deem the transfer to occur immediately before bankruptcy, creating an antecedent debt and subjecting the transfer to preference attack. However, since perfection did occur within 20 days of possession, the § 547(c)(3) defense would protect the transfer from avoidance.

days of possession). If that result was intended, it could have been accomplished much more easily by adding § 547 to the § 546(b) list and by deleting the reference to § 547(e)(2)(A) from § 362(b)(3). Further, such an open-ended post-petition perfection period would delay the administration of bankruptcy cases. Chapter 13 is designed to be an expedited proceeding. Absent an extension for cause, the debtor must file a plan within 15 days of the petition date. F.R. Bankr. P. Rule 3015(b). An open-ended post-petition perfection period would make it difficult to determine the creditor's secured status in a timely fashion. While the time problems are less serious in most Chapter 7 and 11 cases, the need for expedited perfection remains.

In short, interpreting § 547(e)(2)(A) to refer to the effect of perfection is not consistent with the plain language of that section, and it does violence to numerous related Bankruptcy Code provisions. In contrast, interpreting § 547(e)(2)(A) to refer to the act of perfection gives full effect to all related provisions of the Bankruptcy Code and harmonizes the operation of the Bankruptcy Code provisions dealing with relation-back rules.

II.

CONGRESS INTENDED TO ADOPT A UNIFORM FEDERAL RELATION-BACK RULE FOR PREFERENCE ACTIONS.

Although this Court generally follows the plain language of the statute in construing Bankruptcy Code provisions, both the legislative history and the prior law often provide helpful interpretive guidance. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S. Ct. 773, 779, 116 L. Ed. 2d 903, 912 (1992) (prior law); *Timbers*, 484 U.S. at 380, 108 S. Ct. at 635, 98 L. Ed. 2d at 754 (legislative history); *see generally*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S.

Cal. L. Rev. 845, 847 (1992) ("legislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable, or fair"). In the instant case, both the legislative history of § 547 and its relationship to the prior law confirm that § 547 establishes a uniform relation-back period, rather than incorporating the varying relation-back periods of applicable state law.

There appears to be no dispute among the courts or commentators about Congress' intent regarding the incorporation of state law relation-back periods. Even the *Burnette* opinion makes clear that both the legislative history of § 547(e) and its evolution from the related provisions of the prior law demonstrate an intent to establish a uniform federal relation-back period. *See Burnette*, 14 B.R. at 797-801; *see generally*, Zinnecker, 62 Mo. L. Rev. at 73 - 76.

The preference provisions of the Bankruptcy Code are based on § 60 of the Bankruptcy Act of 1898. *See* 11 U.S.C. § 96 (1968). Like the current law, § 60(a) used a lien creditor test to determine the date when personal property transfers were deemed to have occurred for preference law purposes. Thus, the time of perfection generally determined the date of the transfer. Like the current law, the Bankruptcy Act also provided a limited 21-day relation-back exception. Thus, under § 60(a)(7), the date of attachment was used as the date of transfer if the security interest was perfected within the grace period allowed by applicable state law. Zinnecker, 62 Mo. L. Rev. at 74. However, the grace period did not extend beyond 21 days after attachment even if the applicable state law grace period exceeded 21 days. *Id.* In contrast, if the state law grace period was less than 21 days, then the secured creditor was required to comply with the shorter state law period. *Id.* Thus, under prior law, the preference rules incorporated state law grace periods only to shorten the relation-back period, never to extend it.

The changes that resulted in the current provision began with the 1970 report of the National Bankruptcy Conference's Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code. *See* Report of the Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code, *reprinted in* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 204 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6164. The only significant change proposed by the Committee was to adopt a fixed 21-day grace period, "without any provision for cutting back the 21-day period if an applicable filing statute uses a shorter period." *Id.*, 1978 U.S.C.C.A.N. at 6172. Further, although the 10-day relation-back period of UCC § 9-301(2) was the only applicable grace period under Article 9, the Committee recommended retaining the 21-day period because it had become familiar to the bar. Finally, on the question of what constitutes perfection, the Committee Report states:

> Under the Draft definition (as under Article 9 itself) there is no perfection until (1) any act required of perfection (e.g. filing) has been accomplished and (2) "an interest in the property" has been transferred.

Id., 1978 U.S.C.C.A.N. at 6178-79.

The Commission on the Bankruptcy Laws of the United States adopted the recommendations of the Committee, except that it substituted a 10-day grace period for the prior 21-day period. *See* Report of the Commission on the Bankruptcy Laws of the United States, Pt. II, § 4-607(g)(7), *reprinted in* L. King, Collier on Bankruptcy (15th ed. rev. 1977) (app. vol. B). Congress followed the Commission's recommendation when it enacted § 547(e) as part of the Bankruptcy Reform Act of 1978. Zinnecker, 62 Mo. L. Rev. at 75. The legislative history of § 547(e) demonstrates that Congress intended a uniform grace period for the perfection of security interests. It also shows that

Congress used the term perfection in its Uniform Commercial Code sense, which focuses on the acts required for perfection and not on its effect.

If Congress had intended to incorporate state law grace periods, prior § 60(a)(7) provided a statutory model that incorporated shorter grace periods. However, instead of expanding that concept to encompass longer grace periods, "Congress both deleted any reference to state law and shortened the applicable grace period to more closely parallel the then-existing grace period found in the only applicable provision of Article Nine." *Id.* at 76.

Congress again addressed the relation-back issue with two technical amendments in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Although no legislative commentary accompanied the changes, the grace period in the § 547(c)(3)(B) enabling loan exception was changed to more closely parallel U.C.C. § 9-301(2) by running it from the debtor's possession of the collateral, rather than from the date of attachment. Section 362(b)(3) was amended at the same time to clarify that the automatic stay did not prevent the post-petition perfection of enabling loans.

Finally, the 1994 amendments changed the § 547(c)(3)(B) enabling loan grace period to 20 days from possession and added to § 547(e)(2)(A) a cross-reference to the newly amended grace period of § 547(c)(3)(B). Those changes were intended to address the trend in many states toward adoption of longer non-uniform grace periods. As stated in the House Report:

> Section 547(c)(3) of the Bankruptcy Code provides that a trustee may not avoid the perfection of purchase-money security

> interest as a preference if it occurs within 10 days of the debtor receiving possession of the property. This section conforms bankruptcy law to most State's practice by granting purchase-money security lenders a 20-day period in which to protect their security interest.

H.R. Rep. No. 103-835 at 45, 1994 U.S.C.C.A.N. at 3354. Thus, Congress was aware of the trend toward longer non-uniform grace periods. Its response was to adopt a set 20-day period, rather than to defer to state law. Purchase money security lenders were granted "a 20-day period in which to protect their security interest," and not an open-ended state-based period.

The dialogue between Senators Sasser and Heflin that is relied upon by Petitioner does not rebut this conclusion. That discussion occurred in April 1994 and it related to a bill that did not become law. The House bill that did become law was not introduced until the following September. *See* H.R. 5116, 103d Cong., 2d Sess. (1994); 140 Cong. Rec. H 10,006-06 (September 28, 1994). Such colloquy is entitled to very little weight, and certainly not as much weight as the official committee report that accompanied the bill that was enacted. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 298, 115 S. Ct. 1489, 1492, 131 L. Ed. 2d 395, 401 (1995) ("simply represents the views of one informed person on an issue about which others may (or may not) have thought differently"). Finally, the discussion is ambiguous and provides equal support for both sides of the argument. While Senator Sasser's question clearly raises the issue of motor vehicle statutes that provide relation-back periods longer than 20 days, he acknowledges that "there is no statutory language to codify [the *Busenlehner* and *Hesser* interpretations]." 140 Cong. Rec. S4536-37 (daily ed. April 20, 1994). Senator Heflin responds to the question in language similar to the committee report, stating,

"The Committee's decision to increase the time period to 20 days was proposed to conform bankruptcy law practices to most State's practices." *Id.* He "clarifies" Senator Sasser's point by asserting that state law relation-back statutes "do not affect the time of transfer pursuant to section 547." *Id.* Senator Sasser then undermines his own question by stating that "Federal uniformity is keyed to the date on which the debtor receives possession of such property which then activates the running of the 20 day period under section 547." *Id.* Thus, the most that can be said of this excerpt is that Congress was aware of the problem of longer relation-back periods in some motor vehicle statutes at least six months before it passed the 1994 amendments. But, as the language of both the amendment and the official committee report show, Congress' solution to that problem was to adopt a uniform 20-day relation-back period.

The drafting history of the Bankruptcy Code and of the amendments to § 547 demonstrate that the current section carries forward a long tradition of imposing a federal limitation on relation-back provisions. While Congress certainly could have deferred to state law in § 547, Congress' power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" clearly authorizes its choice of a uniform federal rule.[9] *See* U.S. Const, art. I, § 8, cl. 4.

III.

A UNIFORM FEDERAL RULE FURTHERS BANKRUPTCY PREFERENCE POLICY.

At its core, bankruptcy law deals with the question of what

9. Unlike the application of § 548 to mortgage foreclosure sales that was addressed in *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), the long history of a uniform federal relation-back rule shows that § 547(c)(3) and § 547(e)(2)(A) do not "disrupt the ancient harmony" between bankruptcy law and state security law. *See id.* 511 U.S. at 543, 114 S. Ct. at 1764, 128 L. Ed. 2d at 567.

should be done when the debtor cannot satisfy all of its obligations. Thus, it is the very essence of bankruptcy law to upset the expectations of various parties who had pre-petition relationships with the debtor. The preference rules help determine which of those parties must share the bankruptcy burden.[10] In fact, almost all transactions that are attacked as preferences are fully enforceable and valid state law transactions in the absence of bankruptcy. Delayed perfection subjects an otherwise valid security interest to preference attack. As a result the lender loses its privileged position and must share the bankruptcy burden by receiving only its *pro rata* share of the assets. While that is not what the lender expected, it is exactly how the other unsecured creditors are treated. And, just like the lender, they also extended value to the debtor and expected to have their expectations satisfied.

Further, it was not irrational for Congress to conclude that the goal of fairness was better served by holding every purchase money secured creditor to the same preference standard, rather than having identically situated creditors treated differently based solely on differences in the local relation-back rules. Other important bankruptcy interests, such as administrative efficiency similarly support a uniform, easy to administer relation-back rule. Incorporation of state law would not merely result in the possibility of different relation-back periods for creditors from different states. Even for creditors from the same state, different periods, triggered by different events, and running from different points in time might apply depending on the class of creditor and the nature of the collateral. *See, e.g., Walker*, 161 B.R. at 496 (discussing multiplicity of periods within a single state).

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10. Avoidance of a tardily perfected security interest results in no windfall to an individual debtor. The debtor cannot claim an exemption in the recovered asset because the transfer of the security interest was voluntary. *See* 11 U.S.C. § 522(g).

Finally, the timing rules of § 547(e)(2)(A) further the anti-secret lien policy of bankruptcy preference law. While state law relation-back rules reflect an exception to the similar anti-secret lien policy of the state recording statutes, unlimited deference to those state law rules could eviscerate the bankruptcy anti-secret lien policy. For example, West Virginia already grants a 60-day relation-back period to motor vehicle purchase money lenders. *See* W.Va. Code § 17A-4A-4(a) (1996). The Amici Curiae brief suggests that this reflects a six-fold difference between Massachusetts and West Virginia in terms the "commercially reasonable time" that it takes to perfect. Brief of Amici Curiae of the American Automobile Manufactures Association, *et al.* at 17. Whether West Virginian's really need 60 days to complete the forms, or whether political factors explain the difference, a 60-day delay in perfection raises substantially more serious secret lien issues than a 20-day delay. Sixty days is fully two-thirds of the 90-day preference look-back period of § 547(b)(4)(A). Further, Petitioner's argument provides no outside limit on the permissible length of such a relation-back period, or on the classes of creditors who could be the beneficiaries of such a period. The risk that Petitioner's argument poses to preference policy is not mere idle speculation. It already has been addressed by at least one court. As the lower court's opinion in the Ninth Circuit's *Walker* case explains, the Idaho relation-back statute at issue there applied to both purchase money and non-purchase money security interests. *See Walker*, 161 B.R. at 496; *see also* Idaho Code § 49-510(1) (1996). However, even more troubling was the fact that the statute was adopted "*solely* as a means of defending its beneficiaries against avoidance of their security interests in federal bankruptcy proceedings." *Walker*, 161 B.R. at 499 (emphasis in the original); *see also id.* at 489. As *Walker* demonstrates, Petitioner's argument calls for abdication of bankruptcy policy. Congress' instead chose accommodation. Its choice in § 547(e)(2)(A) to give *all* security interests a 10-day grace period from attachment,

and to give purchase money security interests a 20-day grace period from possession represents a reasonable balance between bankruptcy policy and state policy.

CONCLUSION

The Eighth Circuit's interpretation of § 547(e)(2)(A) is the only interpretation that harmonizes the preference timing rules with the related provisions of § 547(e)(2)(C)(ii), § 547(c)(3), § 362(b)(3), and § 546(b). Further it gives full effect to both Congressional intent and to the anti-secret lien policy of bankruptcy preference law.

Wherefore, for the foregoing reasons, Respondent respectfully requests that this Court affirm the Eighth Circuit's decision below.

Respectfully submitted,

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No. 96-1370

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE: DENISE RENEE BEASLEY.

FIDLELITY FINANCIAL SERVICES, INC.,
Petitioner,
v.
RICHARD V. FINK, Trustee,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICI CURIAE* OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION, AND THE AMERICAN FINANCIAL SERVICES ASSOCIATION, IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States
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v.
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BRIEF *AMICI CURIAE* OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION, AND THE AMERICAN FINANCIAL SERVICES ASSOCIATION, IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Automobile Manufacturers Association ("AAMA") is a trade association whose three members,

[1] Pursuant to Proposed Rule 37.6 of the United States Supreme Court Rules, the AAMA, AIAM, NADA, and AFSA state that no other person or entity, other than the AAMA, AIAM, NADA, and AFSA, contributed to the cost of preparing and submitting this brief.

Chrysler Corporation, Ford Motor Company and General Motors Corporation, manufacture automobiles for sale in the United States. Through their finance subsidiaries, each of AAMA's members finances the purchase of millions of motor vehicles each year. AAMA represents its members for the purpose of promoting the general commercial, legislative and other interests of the membership. AAMA has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Association of International Automobile Manufacturers ("AIAM") is the trade association representing the United States subsidiaries of international automobile companies doing business in the United States. AIAM's members are: American Honda Motor Co., Inc.; American Suzuki Motor Corporation; BMW of North America, Inc.; Fiat Auto U.S.A., Inc.; Hyundai Motor America; Isuzu Motors America, Inc.; Kia Motors America, Inc.; Land Rover North America, Inc.; Mazda Motor of America, Inc.; Mercedez-Benz of North America, Inc.; Mitzubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Rolls-Royce Motor Cars Inc.; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation. AIAM represents its members for the purpose of promoting the general commercial, legislative and other interests of the membership. Like the members of the AAMA, these foreign-owned car makers finance the purchase of thousands of cars annually. AIAM has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The National Automobile Dealers Association ("NADA") is a trade association representing both car and truck dealers that are primarily engaged in the retail sale of new and used motor vehicles, both foreign and domestically produced. NADA members are also engaged in automotive service, repair and parts sales. NADA represents these members for the purpose of promoting gen-

eral commercial, legislative and other interests of the membership, as well as providing insurance and other services to its membership. NADA has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The American Financial Services Association ("AFSA") is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 360 companies operating over 10,000 offices engaged in extending consumer credit. AFSA's members include credit card issuers, independently-owned consumer finance companies, diversified financial service companies and automobile finance companies. Consumer finance companies provide one quarter of all consumer credit outstanding in the United States. AFSA has no parent company, subsidiaries, or affiliates that have issued shares of debt securities to the public.

The AAMA, AIAM, NADA, and AFSA collectively represent thousands of members who are involved on a daily basis in the sale and financing of new and used automobiles. As such, these members also are involved in tens of thousands of Chapter 7, Chapter 11, and Chapter 13 bankruptcy cases, many of which present the preferential transfer and perfection issue to be decided in this case.

SUMMARY OF ARGUMENT

Section 547(c)(3) of the Bankruptcy Code[2] exempts from recovery as a preference purchase money security interests and liens that are "perfected on or before 20 days after the debtor receives possession of" the financed

[2] The United States Bankruptcy Code is codified at Title 11 of the United States Code. For ease of reference, the text of this brief refers only to sections of the "Bankruptcy Code" or the "Code." These section references translate without alteration to section references in Title 11 of the United States Code, *i.e.*, section 547(c)(3)(B) of the Bankruptcy Code is codified at 11 U.S.C. § 547(c)(3)(B).

property. 11 U.S.C. § 547(c)(3)(B). The court below erroneously determined that Fidelity Financial Service, Inc. ("Fidelity") perfected its security interest outside the time period allowed by the Bankruptcy Code.

Section 301.600.2 of the Missouri Revised Statutes governs perfection in Missouri of a security interest and lien in motor vehicles. This section provides that perfection occurs by delivery of a properly completed application for title to the Missouri director of revenue. Where the delivery of the application is completed within thirty days of the creation of the lien and security interest on the vehicle, the Missouri statute provides that the lien and security interest are perfected as of the time of their creation. Because Fidelity delivered its completed application for title to the Missouri director of revenue within thirty days of the creation of the lien and security interest on the Debtor's vehicle, Fidelity's lien and security interest were perfected for purposes of state law at the moment of their creation on August 17, 1994. As such, the court below erred in failing to give effect to the provisions of Missouri Revised Statute section 301.600.2 and to exempt Fidelity's properly and timely perfected lien and security interest from avoidance pursuant to section 547(c)(3) of the Bankruptcy Code.

ARGUMENT

The result in this case is determined by the clear and unambiguous language of the Bankruptcy Code. The Bankruptcy Code sets forth a framework for determining the existence of a voidable preference. In this case, whether there is a voidable preference depends upon when Fidelity's security interest and lien were perfected. The Code's definition of "perfected" necessarily and undisputably directs the application of state law. Application of the state law at issue here, which is identical in substance to the law in several other states, determines that Fidelity's security interest in the Debtor's automobile was perfected within twenty days of the date that the Debtor took possession of the vehicle. Accordingly, the Eighth

Circuit Court of Appeals erred in concluding that Fidelity's lien and security interest are avoidable as a preferential transfer, and this Court must reverse the judgment of the Eighth Circuit. This is the only result permitted by this Court's rules of statutory construction, and it is the only result that furthers the policy of consistent and uniform application of the law.

I. THE DIRECTIVE OF THE BANKRUPTCY CODE IS CLEAR AND UNAMBIGUOUS.

Section 547(b) of the Bankruptcy Code allows a trustee in bankruptcy to avoid as a preference certain transfers from a debtor to its creditors. However, the Code further provides that, though a transfer may be otherwise avoidable as a preference under section 547(b), the trustee cannot avoid a transfer that meets the requirements of one of the eight individual subsections of section 547(c). The issue in this appeal is whether section 547(c)(3) protects Fidelity's security interest. Section 547(c)(3) states:

> (c) The Trustee may not avoid under this section a transfer— . . .
>
> (3) that creates a security interest in property acquired by the debtor—
>
> (A) to the extent such security interest secures new value that was—
>
> (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
>
> (ii) given by or on behalf of the secured party under such agreement;
>
> (iii) given to enable the debtor to acquire such property; and
>
> (iv) in fact used by the debtor to acquire such property; and

> (B) that is perfected on or before 20 days after the debtor receives possession of such property.

11 U.S.C. § 547(c). Both Fidelity and the Trustee agree that each of the elements of section 547(c)(3)(A) are met by Fidelity in this case. Thus, the sole dispute in this case is whether Fidelity's lien and security interest were "perfected on or before 20 days after the debtor receive[d] possession" of the automobile.

A. Congress Has Narrowly Defined The Term "Perfected" In Section 547.

Congress chose to define the operative term "perfected" in section 547(e)(1)(B) of the Bankruptcy Code as follows:

> For purposes of [section 547]— . . . a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

11 U.S.C. § 547(e)(1)(B). This definition, by its clear terms, does not describe an action; rather, it describes the circumstance or status of being perfected. Congress in section 547(e)(1)(B) made no attempt to describe the *act* of *becoming* "perfected." Thus, the term "perfected," as defined and used in section 547, is not a verb, "perfected" as defined and used in section 547 is an adjective describing the superior lien position of a secured creditor with regard to its particular collateral. Accordingly, the question in this appeal is *not* whether Fidelity, within the twenty days allowed under section 547(c)(3)(B), had completed the last legally necessary act required by state law to *become* perfected. Instead, the inquiry requires the identification of the date on which Fidelity's lien and security interest, as a matter of state law, first became clothed with the status of being "perfected" such that under state law a creditor on a simple contract could not

have acquired a judicial lien in the Debtor's motor vehicle superior to Fidelity's perfected security interest.

B. State Law Determines The Date That A Security Interest Is Perfected.

As this Court and others have recognized, Congress left to the discretion of the individual states the question of how and at what time a creditor becomes perfected.[3] *McKenzie v. Irving Trust*, 323 U.S. 365, 370, 65 S. Ct. 405, 408, 89 L.Ed. 305, 309 (1945) (holding that state law determines "the precise time when a transfer is deemed made or perfected"). *See also In re Hesser*, 984 F.2d 345, 348 (10th Cir. 1993); *In re Busenlehner*, 918 F.2d 928, 930 (11th Cir. 1990), *cert. denied, Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L.Ed.2d 492 (1991); *In re Hamilton*, 892 F.2d 1230, 1232 (5th Cir. 1990). In this regard, Missouri Revised Statute § 301.600.2 (1994) states, in relevant part:

> A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership . . ., and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

It is undisputed in this case that (a) Fidelity's lien and security interest in the Debtor's automobile were created on August 17, 1994; (b) the Debtor also took possession of the automobile on August 17, 1994; and (c) Fidelity delivered the required papers to the director of revenue

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[3] Although courts are uniform in their agreement that state law controls the time of perfection, some courts nonetheless refuse to follow through and actually apply state law. *See In re Walker*, 77 F.3d 322, 323 (9th Cir. 1996 (noting correctly that state law determines time of perfection, but applying incorrect analysis).

on September 7, 1994, which is twenty-one days after the date on which Fidelity's lien and security interest were created and the Debtor took possession of the automobile. Thus, under Missouri law, it is undisputed that on August 17, 1994, no creditor on a simple contract could have acquired a judicial lien superior to Fidelity's perfected security interest in the Debtor's automobile. Because the Debtor also took possession of the automobile on August 17, 1994, under the plain language of sections 547(c)(3)(B) and 547(e)(1)(B) of the Bankruptcy Code, Fidelity's security interest and lien were "perfected on or before 20 days after the debtor receive[d] possession" of the automobile.

The foregoing analysis is identical to that of the Tenth and Eleventh Circuit Courts of Appeals in *In re Hesser*, 984 F.2d at 348, and *In re Busenlehner*, 918 F.2d at 930, respectively.[4] This is the only analysis supported by the clear and unambiguous language of the Bankruptcy Code.

II. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE BANKRUPTCY CODE MUST CONTROL THIS CASE.

As this Court has long recognized, a court of law should not reach out to find a different result when the plain and unambiguous language of a statute directs a particular outcome (the "Plain Language Rule"). *E.g.*, *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543, 60 S. Ct. 1059, 1063, 84 L.Ed. 1345, 1350-51 (1940); *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L.Ed. 442, 452 (1917). The court of appeals below, and the cases it relied upon, did not follow this basic rule of construction. As such, the results of these cases do not do justice to the clear language of the Code, and the judgment of the Eighth Circuit must therefore be reversed.

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[4] *See also, In re Harley*, 41 B.R. 276, 281 (Bankr. N.D. Ga. 1984) (applying correct analysis); *In re Burnette*, 14 B.R. 795, 797 (Bankr. E.D. Tenn. 1981) (same).

A. This Court Regularly Applies The Plain Language Rule To The Bankruptcy Code.

In *United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989), this Court was asked to disregard the clear language of the Bankruptcy Code in favor of a result that was arguably supported by pre-Bankruptcy Code law. The respondent in *Ron Pair* argued that a nonconsensual secured claim should be treated differently from a consensual secured claim under section 506(b) of the Bankruptcy Code, despite the fact that the Bankruptcy Code made no distinction between the two. This Court rejected respondent's argument, noting:

> The task of resolving the dispute over the meaning of [the Bankruptcy Code] begins where all such inquiries must begin: with the language of the statute itself. In this case, it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." (Internal citations omitted.)

489 U.S. at 235, 109 S. Ct. at 1030, 103 L.Ed.2d at 298. This Court has made similar pronouncements in other cases involving the Bankruptcy Code. *See Union Bank v. Wolas*, 502 U.S. 151, 158, 112 S. Ct. 527, 531, 116 L.Ed.2d 514, 522 (1991) (rejecting argument contrary to language of section 547(c)(2), noting "that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning"); *Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S. Ct. 1386, 1391, 118 L.Ed.2d 39, 48 (1992) (relying upon language of Bankruptcy Code, noting "appeals to statutory history are well-taken only to resolve 'statutory ambiguity' ").

Ignoring the well-settled precedent from this Court, the Eighth Circuit and the cases that court relied upon chose not to follow the Plain Language Rule. Thus, as discussed

below, the Court should disregard these cases and apply the plain language of the Code.

B. *In Re Loken* Did Not Follow The Plain Language Rule And Was Wrongly Decided.

The Eighth Circuit's opinion in this case relied exclusively upon the reasoning of the Ninth Circuit's Bankruptcy Appellate Panel in *In re Loken*, 175 B.R. 56, 61 (B.A.P. 9th Cir. 1994). In *Loken*, the court followed, up to a point, the identical analysis set forth in Part I of this brief, including the critical recognition that state law controls the method and timing of perfection. *Id.* at 60-61. However, *Loken* departed from the correct analysis when it concluded that Congress' definition of "perfection" in section 547(e)(1)(B) refers to that specific point in time "when the transferee takes the last step required by state law to perfect its security interest." *Id.* at 61-62.

The analysis in *Loken* is ill-conceived. There is obviously no reference whatsoever in section 547(e)(1)(B) of the Bankruptcy Code to the "last step required by state law." By its clear terms, section 547(e)(1)(B) defines only what it means to *be* "perfected." To conclude otherwise requires a needless stretch of interpretation. If Congress wanted to describe a specific point in time by reference to "the last step required by state law," it could have easily done so. Instead, by the clear and natural reading of section 547(e)(1)(B), Congress described only the status of being "perfected," and left the question of "how" and "when" to the individual states. Nonetheless, the *Loken* court insisted upon reading beyond the plain meaning of the Code and, as a result, it reached an impermissible result.

The clear language of section 547(e)(1)(B) begs the question of why the *Loken* court felt compelled to reach beyond the statutory language. On this score, the court suggested that its definition of "perfected" is more consistent with the statute as a whole and that courts reaching

a different conclusion haven taken the word "perfected" out of context. *Id.* at 61-62. However, the court's only support for this suggestion was that the "general usage" of the term "perfected" refers to a single moment in time. *Id.* at 62. The court then noted, as its only example, that use of the term "perfected" in the Oregon State statute refers to a specific point in time. *Id.* The court's reference to state law reveals the circular nature of its argument. State law *must* define the single point in time at which a creditor first becomes perfected because federal law does *not*.

In the end, the opinion in *Loken* was result-driven. Rather than follow the plain language of section 547(e)(1)(B), the court went to great lengths to extrapolate a different outcome. Nonetheless, the *Loken* court ultimately failed to offer any reason why a creditor, such as Fidelity in this case, should not enjoy the full benefits of state law when Congress has not exercised its authority to command a different result.

C. Other Cases Arguably Supporting The Eighth Circuit's Opinion Are Either Wrong Or Inapplicable.

In addition to the opinion of the Ninth Circuit's Bankruptcy Appeal Panel in *Loken*, the Trustee may rely upon two circuit court opinions, *In re Walker*, 77 F.3d 322 (9th Cir. 1996), and *In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990), to support the Eighth Circuit's decision in this case. These cases should not influence the Court.

Following the opinion in *Loken*, the Ninth Circuit issued an opinion on this issue in *In re Walker*, 77 F.3d 322 (9th Cir. 1996). However, this opinion does not bolster, or even apply, the analsyis in *Loken*. Instead, the *Walker* opinion merely concludes that "the Code gives [20] days, not 30, in which to perfect a transfer. In bankruptcy, the [Bankruptcy] Code trumps the law of the state." *Id.* at 323. The Ninth Circuit necessarily, and incorrectly, assumed a conflict between federal and state law. There is no such conflict.

As noted, the "when" and the "how" of perfection is decided by state law. *McKenzie*, 323 U.S. at 370, 65 S. Ct. at 408, 89 L.Ed.2d at 309. Accordingly, if a state has enacted a "relation back" perfection statute, that statute does not conflict with the Bankruptcy Code. The twenty days allowed by section 547(c)(3)(B) of the Bankruptcy Code provide a "grace period" within which the creditor's perfected status will save the creditor's lien and security interest from avoidance by a trustee. By contrast, the number of days (in this case, thirty days) allowed by a state law "relation back" perfection statute establish the amount of time a creditor has to ensure that it will be perfected "as of" the day the lien first was created. As discussed above in Part I the purposes of the "grace period" in the Code and "relation back" provisions in state law are related, but different; they work together, not in opposition.

Illustrative of this point is the Fifth Circuit's opinion in *In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990). In *Hamilton*, unlike the present case, the Fifth Circuit was faced with a Texas law twenty-day "grace period" statute rather than a twenty-day "relation back" statute. By its terms, the Texas statute did *not* render a creditor perfected "as of" the date it first created its lien. *Id.* at 1232 n.7. Further, the Texas statute expressly foreclosed the rights of a bankruptcy trustee provided the creditor filed its certificate within twenty days. *Id.* Thus, the twenty-day "grace period" in *Hamilton* arguably conflicted with what was then a ten-day "grace period" in the Bankruptcy Code.[5] The Fifth Circuit concluded that the Bankruptcy Code prevails. *Id.* at 1230.

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[5] The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, amended section 547(c)(3)(B) of the Bankruptcy Code to increase from ten days to twenty days the grace period provided for in that section. The Bankruptcy Reform Act of 1994 became effective on October 22, 1994, and applies to bankruptcy cases commenced on or after that date.

Although it is unclear whether the Fifth Circuit's opinion in *Hamilton* rested upon the distinction between a "grace period" statute and a "relation back" statute, that distinction is critical, and it renders *Hamilton* inapplicable to this appeal.[6] Clearly, the United States Constitution reserves to Congress the power to legislate in the area of bankruptcy. U.S. Const. art. I § 8. Any attempt by a state to duplicate the function of the Bankruptcy Code would be subject to appropriate constitutional challenge. A "relation back" statute, however, does not duplicate the function of section 547(e)(1)(B) of the Bankruptcy Code. Rather, "a relation back" statute merely fulfills a function that the Bankruptcy Code leaves up to the states —defining the first date that a creditor's lien and security interest may not be displaced in priority by a judicial lien obtained by a creditor suing on a simple contract. As such, *Walker* and *Hamilton* are either unpersuasive or irrelevant to the proper analysis in this appeal and, once again, the plain language of the Bankruptcy Code must prevail.

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[6] The Fifth Circuit recently relied upon *Hamilton* in deciding *In re Locklin*, 101 F.3d 435, 442 (5th Cir. 1996). Unlike *Hamilton*, *Locklin* involved a true "relation back" statute (Alabama Code section 32-8-61). The Fifth Circuit, however, did not address the distinction between "relation back" statutes and "grace period" statutes. Therefore, the opinion in *Locklin*, like the Ninth Circuit's opinion in *Walker*, incorrectly assumed a conflict between the Bankruptcy Code and state "relation back" statutes. As noted above, and below in Part III.A of this brief, the Court should not assume that state "relation back" statutes conflict with the Bankruptcy Code.

III. EVEN IF THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE DID NOT CONTROL THIS CASE, OTHER RULES OF STATUTORY CONSTRUCTION AND STRONG POLICY CONSIDERATIONS REQUIRE THAT FIDELITY PREVAIL IN THIS APPEAL.

The plain language of the Bankruptcy Code should control this appeal.[7] Nonetheless, additional reasons require the same result. This Court may not invalidate a state's law where that state's law can be read consistently with the Bankruptcy Code. To do so would needlessly supplant the well-reasoned judgment of the individual states and would subject many creditors to an inconsistent application of the law. Indeed, the uniform application of the law in this area is best served by recognizing, rather than striking down, the validity of state law "relation back" provisions.

Twenty-seven states have statutory "relation back" motor vehicle perfection statutes.[8] At least seven of these

[7] Were the Court to determine that section 547 of the Bankruptcy Code was ambiguous such that the plain language of the Code does not control the outcome of this appeal, then it would be appropriate for this Court to refer to the legislative history of section 547(e)(1)(B) to resolve the statutory ambiguity. *Patterson v. Shumate*, 504 U.S. 753, 761, 112 S. Ct. 2242, 2248, 119 L.Ed.2d 519, 524 (1992). Reference to that legislative history clearly confirms without question the error of the eighth Circuit in this appeal. *See* 140 Cong. Rec. S4536-37 (daily ed. April 20, 1994) (statements of Sen. Heflin and Sen. Sasser) (confirming the intent of the Senate in S. 540 (the Senate's version of the Bankruptcy Reform Act of 1994) to adopt the interpretation of the Tenth Circuit in *In re Hesser* and the Eleventh Circuit in *In re Busenlehner* insofar as S. 540 impacts upon state "relation back" perfection statutes).

[8] *See e.g.*, Ala. Code § 32-8-61 (1996); Alaska Stat. § 28.10.391 (Michie 1996); Conn. Gen. Stat. § 14-185 (1997); Fla. Stat. ch. 319.27 (1996); Ga. Code Ann. § 40-3-50 (1996); Idaho Code § 49-510 (1996); Ky. Rev. Stat. Ann. § 186A.195 (Michie 1996); Me. Rev. Stat. Ann. tit. 29, § 702 (West 1996); Md. Code Ann. § 13-202 (1996); Mass. Ann. Laws ch. 90D, § 21 (Law. Co-op. 1996); Minn. Stat. § 168A.17 (1996); N.H. Rev. Stat. Ann. § 261:24 (1996); N.Y. [Veh. & Traf.] § 2118 (Consol. 1996); N.C. Gen. Stat. § 20-58.2

states allow a creditor more than twenty days to file or deliver the appropriate papers to the statutorily designated official, agency or department, and therefore to be deemed "perfected" as of the date on which the lien and security interest first were created or executed.[9] Furthermore, the Uniform Vehicle Code, as promulgated by the National Committee on Uniform Traffic Laws and Ordinances, provides for a "relation back" perfection statutory period of thirty days. Unif. Vehicle Code § 3-302(b) (1992). Accordingly, if this Court were to uphold the Eighth Circuit's decision, the "relation back" statutes in at least seven states would be preempted by the Bankruptcy Code. As discussed below, such a result is unsupportable, and ill-advised.

A. The Bankruptcy Code Does Not Preempt State "Relation Back" Provisions.

In the area of implied conflicts, this Court has long refused to preempt a state statute with federal law unless the conflict between the two is "direct and positive," such that the two laws "cannot be reconciled or consistently stand together." *Kelly v. Washington*, 302 U.S. 1, 10, 58 S. Ct. 87, 92, 82 L.Ed. 3, 10-11 (1939). *See also, Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L.Ed.2d 714, 721 (1985) (noting preemption in the area of implied conflicts should not occur unless reconciliation of state and federal law is a "physical impossibility"); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 751, 62 S. Ct. 820, 826, 86 L.Ed.

(1996); Okla. Stat. tit. 47, § 1110 (1996); R.I. Gen. Laws § 31-3.1-19 (1996); S.C. Code Ann. § 56-19-630 (Law Co-op. 1996); Tenn. Code Ann. § 55-3-126 (1996); Vt. Stat. Ann. tit. 23, § 2042 (1996); Wash. Rev. Code Ann. § 46.12.095 (West 1996).

[9] Ark Code Ann. § 27-14-806 (Michie 1995) (allowing 30 days); 625 Ill. Comp. Stat Ann. 5/3-202 (West 1997) (21 days); Mo. Rev. Stat. § 301.600 (1996) (30 days); N.M. Stat. Ann. § 66-3-202 (1996) (60 days for mobile homes or recreational vehicles); Utah Code Ann. § 41-1a-605 (1996) (30 days); Va. Code Ann. § 46.2-639 (Michie 1996) (30 days); W. Va. Code § 17A-4A-4 (1996) (60 days).

1154, 1165 (1942) (refusing preemption when state and federal law could be interpreted consistently with one another).

Applying this Court's well-settled precedent, even if the analysis in Part I of this brief were not required by the plain language of the Bankruptcy Code, that analysis is, at the very least, a valid construction and reconciliation of the Bankruptcy Code and the "relation back" perfection statute in the State of Missouri. This conclusion is all the more self-evident from the fact that the Bankruptcy Code affirmatively relies upon state law to determine how, and at what time, a creditor becomes perfected. Because state "relation back" provisions such as the Missouri statute at issue here can be, and by every indication are intended to be, construed together with the Bankruptcy Code, this Court should not adopt an interpretation of the Code that causes the two laws to conflict. Accordingly, this Court should apply state law "relation back" provisions consistently and in harmony with the Bankruptcy Code, as the plain language of the Code allows and requires.

B. The Individual States Should Be Free To Formulate Their Own "Relation Back" Provisions.

To disarm a state's power to promulgate its own "relation back" perfection statute is to ignore the very reason for leaving these matters to the discretion of the individual states. By necessity, property rights and interests are relatively "localized" matters that are uniformly left to the discretion of the states. *Cf. Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972) (noting that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). These matters are properly left to the discretion of the individual states because the individual states are in the best position to develop and enforce laws that are consistent with the practices and conditions in each state.

"Relation back" perfection laws, such as the one at issue here, reflect the intent of a state's legislature to accommodate the commercially reasonable time it takes to perfect a security interest, as determined by the practice and conditions in that particular state. Thus, the commercially reasonable time in Massachusetts (ten days) is apparently not the same as in West Virginia (sixty days). These different time periods reflect individual, presumably well-reasoned, determinations by the states. Absent some clear manifestation of Congress' intent, this Court should not assume that the Bankruptcy Code overrides these determinations—especially when the clear language of the Code directs otherwise.

C. Upholding State "Relation Back" Provisions Will Promote The Consistent And Uniform Application Of The Law.

Arguing against the application of state "relation back" perfection statutes, the *Loken* court relied upon the policy of promoting "a uniform rule throughout the country." 175 B.R. 56, 62. However, opinions such as *Loken* will actually promote inconsistency and uncertainty. Thus, to the extent that uniformity is a virtue, that goal is better served by upholding state "relation back" provisions.

Contrary to the likely argument of the Trustee, this Court is not being asked to extend indefinitely the grace period under section 547(c)(3)(B) of the Bankruptcy Code. In fact, this Court is not being asked to extend any time period. Rather, this Court need only recognize and give effect to the interplay between section 547(e)(1)(B) and section 547(c)(3)(B). Under section 547(e)(1)(B) of the Bankruptcy Code, the date of perfection is determined by reference to state law. Once established, section 547(c)(3)(B) of the Bankruptcy Code inquires whether that date falls within the twenty-day period after which the debtor received possession of the financed property.

This approach is consistent with and furthers the goal of "a uniform rule throughout the country." The date of perfection, as determined under state law, must still be within twenty days of the debtor's initial possession of the

property. However, just as each state's laws on how to perfect a security interest may be different, so may each state's laws differ on how to determine the date of perfection. Nonetheless, the end result is the same: to protect a lien and security interest under section 547(c)(3)(B), the date of perfection, as determined under the state's laws, must be within twenty days of the date on which the debtor first received possession of the property. It is within that context which we maintain a "uniform rule throughout the country."

Any other procedure produces absurd results. If "relation back" perfection statutes are preempted by the Bankruptcy Code, a creditor in a given state may have two dates on which he was "perfected"—one date if the debtor is in bankruptcy and another date if the debtor is not. Further, a creditor is stripped of its reasonable expectation that it will be perfected if it follows state law. There is no conceivable justification for this Court to impose such a burden on creditors. Indeed, as noted throughout this brief, there is every reason not to impose such a result.

CONCLUSION

For the foregoing reasons, the AAMA, AIAM, NADA and AFSA, as amici curiae, respectfully pray that this Court will reverse the judgment of the Eighth Circuit Court of Appeals and remand this case to the bankruptcy court with directions that judgment be entered in favor of Fidelity and against the Trustee.

Respectfully submitted,

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